



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT AT MOMBASA

CONSTITUTIONAL PETITION NUMBER 11 OF 2017

IN THE MATTER OF: ARTICLES 10, 19, 20, 22, 23, 41, 47, 162 AND 258 OF THE CONSTITUTION OF KENYA 2010;

AND

IN THE MATTER OF: SECTION 3, 4, 5 [2] [c] AND 7 OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015;

AND

IN THE MATTER OF: SECTION 12 OF THE EMPLOYMENT AND LABOUR RELATIONS COURT ACT;

AND

IN THE MATTER OF: BREACH AND THREATENED CONTINUED BREACH OF THE BILL OF RIGHTS UNDER ARTICLES 41 AND 47 OF CONSTITUTION OF KENYA 2010;

BETWEEN

1. MOHAMMED SHERIA

2. JOSEPH SIALO MAKERO

3. GUNDA KANENO.....PETITIONERS

AND

1. SIMON KIPKORIR SANG

2. DOCK WORKERS UNION [K]

3. SALIM BAMBAULO

4. MARTHA MWAKA

5. NANA MOTE

6. GLADYS JEPKORIR.....RESPONDENTS

AND

REGISTRAR OF TRADE UNIONS.....INTERESTED PARTY

Rika J

Court Assistant: Benjamin Kombe

JUDGMENT

Petition and Response

1. The Petitioners filed their Petition on 29th June 2017. The Petitioners state, that they amended their Petition subsequent to 29th June 2017. They describe themselves as Chairperson, National Treasurer, and Assistant National Chairperson of the 2nd Respondent respectively.
2. The 1st Respondent is the General Secretary of the 2nd Respondent, while the 2nd Respondent is a registered Trade Union. 3rd, 4th, 5th and 6th Respondents are described as persons who have purported to act as National Chairperson, National Assistant Chairperson, National Treasurer, and Assistant National Treasurer respectively. The Interested Party is a State Officer appointed under Section 31 of the Labour Institutions Act 2007, responsible for registration and regulation of Trade Unions, Employer Organizations, Federations and their Officials.
3. The Petitioners allege the 1st Respondent was involved in misuse of 2nd Respondent's funds. They state that the 1st Respondent took control of the 2nd Respondent and was running the 2nd Respondent like his personal business. The Petitioners challenged the 1st Respondent over misuse of the 2nd Respondent's funds. The 1st Respondent engaged in malicious machinations to have the Petitioners removed from office.
4. The National Executive Committee of the 2nd Respondent convened on 6th April 2017. 14 allegations were made against the 2nd Petitioner, ranging from misuse of 2nd Respondent's funds, to unilateral revocation of decisions made by the Standing Committees of the Board. A vote was taken and a resolution made to remove the 2nd Petitioner from the Office of Treasurer.
5. The 1st Petitioner wrote to the Interested Party [Registrar of Trade Unions] clarifying that the decision of the National Executive Committee against the 2nd Petitioner was against the Constitution of the 2nd Respondent. The Interested Party wrote back on 25th May 2017, advising the 1st Respondent to abide by the Constitution of the 2nd Respondent. The Interested Party rejected form Q, which had been forwarded to her Office by the 1st Respondent, seeking to have the removal of the 2nd Petitioner, and appointment of 2nd Petitioner's replacement, reflected in the register of Trade Unions.
6. Prior to this, the 1st Respondent informed the 2nd Petitioner, through a letter dated 9th May 2017, that the 2nd Petitioner had been suspended. This was followed by another letter dated 11th May 2017, in which the 1st Respondent informed the 2nd Petitioner that the 2nd Petitioner's removal had been 'validated'. There was no resolution backing the communication from the 1st Respondent. There is no procedure for 'validation,' under the 2nd Respondent's Constitution.
7. In the absence of the 1st Petitioner, the 1st Respondent attempted to force the 3rd Petitioner to chair a meeting of the National Executive Committee on 18th May 2017. When the 3rd Petitioner declined to do so, the 1st Respondent introduced '*the conduct of the National Assistant Chairman,*' as part of the agenda. The 3rd Petitioner walked out of the meeting in protest. The 1st Respondent and his Assistant went on to level certain allegations against the 1st and 3rd Petitioners: it was alleged that the 1st and 3rd Petitioners had started campaigns of poisoning and inciting Members for selfish gain; they were undermining the leadership of the 1st Respondent; and they had mistreated 2nd Respondent's National Assistant General Secretary. The meeting, without calling on the 1st and 3rd Petitioner to defend themselves, made a resolution for removal from Office of the 1st and 3rd Petitioners. It was the finding of the Committee that the 2 Petitioners had incited members and refused to discharge their duties in accordance with the Union Constitution.
8. After the Petition was filed, the 2nd Respondent purported to convene a meeting of its Dispute Resolution Committee on 24th July 2017. The same issues brought before the Court were deliberated upon. A resolution followed alleging to strip the Petitioners of their membership of the 2nd Respondent. This was never disclosed to the Court, even when the matter came up for hearing. The Court had issued an order for retention of the *status quo*.
9. On 22nd October 2017, the 1st Respondent called a Special General Conference. There was no quorum. The Special Conference purported to pass resolution removing the Petitioners as Members of the 1st Respondent. This agenda was introduced on the floor of the meeting. The 1st Respondent then forwarded another form Q to the Interested Party. The form was rejected. The Interested Party observed there was Petition on the subject matter pending before the Court.
10. The Petitioners ask the Court, to find the Respondents in breach of the Constitution of Kenya, the Employment and Labour Relations Court Act, the Fair Administrative Action Act, the Labour Relations Act, and the Dock Workers Union's Constitution. They pray in the Petition filed on 29th June 2017, for grant of the following Orders:-

- a) A declaration that the Petitioners' right to fair administrative action, guaranteed under Article 47 of the Constitution of Kenya has been contravened.

- b) A declaration that the Petitioners' right to join, form and/or participate in the lawful activities of a Trade Union, as guaranteed under Article 41 of the Constitution of Kenya has been contravened by the Respondents.
- c) A declaration that the resolution of the 2nd Respondent's National Executive Committee made on 6th April 2017 was illegal, unconstitutional, unreasonable and therefore null and void to the extent that the same purported to remove the 2nd Petitioner from Office without according him a hearing and/or to the extent that the same was *ultra vires* the powers of the National Executive Committee as set out in the 2nd Respondent's Constitution.
- d) A declaration that the subsequent decisions of the 1st Respondent to suspend the 2nd Petitioner on 9th May 2017, remove the 2nd Petitioner from Office on 11th May 2017, and to suspend him on 2nd June 2017, were all illegal, unconstitutional, unreasonable, null and void to the extent that the 2nd Petitioner was not accorded a hearing at all before any of those decisions were taken and/or to the extent that the same were *ultra vires* the powers of the 1st Respondent as set out in the 2nd Respondent's Constitution.
- e) A declaration that the resolutions of the 2nd Respondent's National Executive Committee made on 18th May 2017 were illegal, unconstitutional, unreasonable and therefore null and void to the extent that the same purported to remove the 1st and 3rd Petitioners from Office without according them a hearing and/or to the extent that the same was *ultra vires* the powers of the National Executive Committee of the 2nd Respondent as set out in the 2nd Respondent's Constitution.
- f) An order of certiorari bringing into this Court the decisions of the 2nd Respondent's National Executive Committee made on 6th April 2017 and 18th May 2017, and quashing the same forthwith, to the extent that the same purported to remove the Petitioners from Office without according them a fair hearing and/ or the extent that the same was *ultra vires* the powers of the National Executive Committee of the 2nd Respondent as set out under the 2nd Respondent's Constitution.
- g) An order of certiorari bringing into this Court the decision of the 2nd Respondent's National Executive Committee made on 18th May 2017 and quashing the same forthwith to the extent that the same purported to appoint the 3rd, 4th, 5th, and 6th Respondents as Acting National Chairperson, Acting National Assistant Chairperson, Acting National Treasurer and Acting National Assistant Treasurer of the 2nd Respondent.
- h) An order of certiorari bringing into this Court the decisions of the 1st Respondent made on 9th May 2017, 11th May 2017 and 2nd June 2017 purporting to suspend the Petitioners from Office, and quashing the same forthwith, to the extent that the same purported to suspend the Petitioners from Office without according them a fair hearing.
- i) An order of mandamus for reinstatement of the Petitioners as National Chairperson, National Treasurer and National Assistant Chairperson of the 2nd Respondent, respectively.
- j) An order of permanent injunction barring the Respondents from removing the Petitioners from Office in any manner not provided for in the 2nd Respondent's Constitution and/or law, and restraining the 3rd, 4th, 5th, and 6th Respondents from acting or purporting to act as Officials of the 2nd Respondent in the capacities of National Chairperson, National Assistant Chairperson, National Treasurer and National Assistant Treasurer, until and unless the current Office Holders are removed from Office in a manner prescribed in the 2nd Respondent's Constitution and/or by law.
- k) An order for payment of such compensation for breach of the Petitioners' constitutional rights as the Honourable Court shall determine fit to grant.
- l) Costs of the Petition.
- m) Such other or further orders or directions as the Court may deem fit to grant to meet the interest of justice.

11. The Respondents filed a Notice of Preliminary Objection on 7th July 2017, arguing that the Court does not have jurisdiction to hear and determine the Petition; that regulation of the affairs of the 2nd Respondent is entirely in the docket of the Interested Party; and that the Petition is *res judicata*, as the same issues in dispute were dealt with by the Court, in this Court's Cause Number 421 of 2017. The Court rejected Respondents' Preliminary Objection in a Ruling dated 24th October 2017.

12. The Respondents filed their Response on 26th January 2017. They concede the description of the Parties, but hasten to add that the 3rd to 6th Respondents are duly registered by the Interested Party as Officers of the 2nd Respondent, and are entitled to act in any vacant positions. It is conceded that the Petitioners were elected to the various positions stated in their Petition. They were registered as such Office Holders by the Interested Party.

13. Every decision made by the 2nd Respondent's National Executive Committee was made pursuant to Article 12 of the 2nd Respondent's Constitution. The 1st Respondent contributed to the deliberations of NEC as an ordinary Member. Every Member is entitled to vote where resolution is not unanimous. The 1st Respondent could not have influenced the decision of other 23 Members of NEC. The allegations by the Petitioners against the 1st Respondent were personal.

14. The Petitioners led a campaign of hatred against the 1st Respondent. They stood on a platform of regionalism and incitement against upcountry candidates, in the 2nd Respondent's last elections. Their preferred candidate for the position held by the 1st Respondent lost

against the 1st Respondent. This is the genesis of the Petition herein. The 2nd Respondent has been one of the most stable Trade Unions in Kenya under the leadership of the 1st Respondent. The Petitioners cannot purport to have been more loyal to the Union Constitution than other Members.

15. The 2nd Petitioner travelled abroad for 3 weeks in the company of his Assistant. Their absence precipitated a crisis in the management of the 2nd Respondent, as the 2nd Respondent could not access funds from its Bank, without the 2nd Petitioner's, or 2nd Petitioner's Assistant's signature. This had to be mitigated.

16. NEC, exercising its powers under Article 12 [3] [h] of the 2nd Respondent's Constitution, conferred the powers of the 2nd Petitioner and his Assistant, to the National Trustee of the 2nd Respondent. The action was meant to mitigate the crisis created by the Petitioners.

17. The Respondents state that the Petitioners engaged in perennial politics, undermining the 2nd Respondent's ability to deliver to its Members. They disregarded the Organs of the 2nd Respondent.

18. The Respondents concede there was a meeting of NEC held on 6th April 2017. The Interested Party found that NEC had acted irregularly by recommending the removal from Office of the 2nd Petitioner. The decision was annulled. By the time of filing of the Petition, the decision for removal of the 2nd Petitioner had been annulled by the Interested Party. This is therefore not a matter in dispute before this Court, capable of being litigated and remedied.

19. The Respondents state that the Interested Party did not exercise her mind judiciously in her refusal to accept form Q, submitted to her in implementation of NEC's decision to remove the 2nd Petitioner from Office. NEC therefore commuted removal to suspension. The 2nd Petitioner was made aware of charges leveled against him. He was aware of the date when he would be heard before a Panel which was constituted to hear him. The 2nd Respondent met the standards of fairness under Article 47 of the Constitution of Kenya.

20. The Petitioners were required to appear before the Dispute Resolution Committee. They were invited in writing. They were accorded opportunity to state their respective positions. They failed to utilize this opportunity. The meeting of this Committee went on, on the 24th July 2017. None of them had been removed by the time of filing the Petition. Questions of irrationality, unfairness and bias do not therefore arise.

21. The 1st Petitioner did not show up for the NEC meeting of 18th May 2017. 3rd Petitioner was present and mandated under the 2nd Respondent's Constitution, to chair the meeting. He disagreed with the agenda, stormed out and abdicated responsibility. NEC could not assist the 1st and 3rd Petitioners in their efforts to undermine operations of the 2nd Respondent. They were suspended and given a chance to explain themselves before the Dispute Resolution Committee.

22. The final decision-making organ of the Respondent is Annual/Special Conference, pursuant to Articles 9, 10 and 11 of the 2nd Respondent's Constitution. The 2nd Respondent has a right under Article 41 of the Constitution of Kenya, and Section 8 of the Labour Relations Act 2007, to reject or admit a Member. Nothing done within the confines of the law can be deemed unlawful, or declared unconstitutional. The Petitioners ceased to be Officials of the 2nd Respondent once they were suspended or removed from the Union. The Petition as, filed is moot. The Petitioners cannot be reinstated as Officials of the Union, having been removed as Members of the Union.

23. The Respondents state they have not acted in contravention of any order of the Court. The Order of the Court issued on 22nd October 2017 after the acts the Petitioners allege the Respondents engaged in, were committed. The Fair Administrative Action Act 2015 does not apply to private persons such as the Parties herein. The Respondents urge the Court to find that the decision of the Special Conference removing the Petitioners from the Union/ Office is valid. Lastly, they submit that the Amended Petition was introduced to the proceedings as an annexure to a Replying Affidavit sworn by the 1st Petitioner on 4th December 2017 and filed on 5th December 2017. There was no fee paid for the Amended Petition. There is no Amended Petition validly on record. They ask the Court to dismiss the Petition with costs to the Respondents.

Submissions

24. Parties filed Submissions. They made brief oral highlights of Submissions to the Court, on 7th June 2018. These Submissions basically replicate the lengthy Petition and Response filed by the Parties. The Court shall avoid, as far as possible, rehash of the Submissions filed by the Parties, but shall for the sake of clarity, quickly recap these Submissions.

25. On the technical question whether the Amended Petition is properly before the Court, the Petitioners submit, that the Court gave an order on 14th December 2017, that "***the Amended Petition is deemed duly filed***". The Amended Petition cannot therefore be, improperly before the Court.

26. The Petitioners submit that Fair Administrative Action Act was enacted to give effect to Article 47 of the Constitution, and applies to any Person who exercises administrative authority. Article 41 protects the right of every Person to form, join and participate in the activities of a Trade Union. The decisions of the 1st and 2nd Respondents against the Petitioners fell within the reach of Fair Administrative Action Act.

27. The Court of Appeal, in ***Judicial Service Commission of Kenya v. Mbalu Mutava & Another [2015] e-KLR***, concluded that unlike the right to fair hearing under the common law, the right to fair administrative action is wide in scope, as it encompasses several duties: the duty to act expeditiously; duty to act fairly; duty to act lawfully; duty to act reasonably; and in specified cases, duty to give written reasons for the decision. The Petitioners were denied the right to fair administrative action, which entails substantive justice, rather than procedural justice.

28. NEC of the 2nd Respondent does not have the power under 2nd Respondent's Constitution, to remove an Official from Office. The decision to remove the Petitioners offended Articles 9 and 12 [3] [b] of the 2nd Respondent's Constitution and Articles 41 and 47 of the Constitution of Kenya.

29. The Petitioners were referred to the Dispute Resolution Committee of the 2nd Respondent on 24th July 2017, when the dispute was already in the docket of the Court. The Committee went about its business in disregard of the proceedings of the Court, and purported to deprive the Petitioners of their membership of the 2nd Respondent Union.

30. It is submitted for the Petitioners that the Respondents were aware of the Court Order for maintenance of the status quo made on 28th July 2017, yet they went ahead and convened a Special General Conference on 22nd October 2017. The agenda on removal of the Petitioners from the roll of membership was introduced on the floor of the meeting.

31. These decisions made by the Respondents at various turns, were aimed at removing the Petitioners from Office. The 1st Respondent hoped in the end to maintain financial control of the 2nd Respondent, and operate in a manner which was unaccountable to the Members of the 2nd Respondent. The 1st Respondent needed a malleable Treasurer, who would do his bidding. The 1st Respondent set out to achieve this end, even at the cost of disobeying a Court Order.

32. Quoting the Hon. Justice David Maraga [now the Hon. Chief Justice of Kenya] in **Abdulhamid Ebrahim Ahmed v. Municipal Council of Mombasa [2004] e-KLR**, the Petitioners submit that they are entitled to punitive damages against the 1st Respondent, which are given to vindicate the rule of law. They pray the Court to grant them exemplary damages at Kshs. 2 million each. They submit they merit compensation generally against the Respondents for repeated breach of fundamental rights and freedoms under Article 41 and 47 of the Constitution. They state an amount of Kshs. 1.5 million each to Petitioners, would be fair compensation.

33. The Petitioners submit that the Fair Administrative Action Act applies to Trade Unions. Article 23 of the Constitution allows this Court to grant remedies sought by the Petitioners.

34. The Respondents submit that the Petition is incompetent. It does not meet the standard of a Constitutional Petition under Article 22 of the Constitution. It discloses no cause of action against the Respondents.

35. A Person claiming constitutional infringement, must give sufficient notice to his adversary to allow the adversary to adequately prepare his case, as held by the **High Court in Petition Number 229 of 2012, Trusted Society of Human Rights Alliance v. Attorney-General & Another**. The complaints against the Respondents have not been fashioned in a way that gives the Respondents proper notice. In **Nairobi H.C. Petition Number 1039 of 2007 between John Kimani Mwangi v. Town Clerk Kangema**, the Court held that Petitioners must state the provision of the Constitution allegedly infringed against them, and the nature and extent of that infringement. It is not sufficient to rely on a broad notion of unconstitutionality.

36. The Respondents argue that the Petitioners have adopted more than one procedure in coming to Court. They have come through the Constitution of Kenya [Protection of Rights and Fundamental Freedoms] Practice and Procedure Rules 2013, and through Judicial Review pursuant to the Fair Administrative Action Act 2015. Consequently, the Court cannot fashion its own remedies. The Petition ought to be dismissed.

37. Jurisdiction under Article 22[1] of the Constitution of Kenya is conferred upon the High Court alone. It is a special jurisdiction granted exclusively to the High Court. The Employment and Labour Relations Court does not have jurisdiction. Proceedings under the Fair Administrative Action Act for review of administrative actions shall be determined within 90 days of their being filed. Any orders sought under Judicial Review have abated.

38. It is submitted for the Respondents that the Petitioners did not file Supporting Affidavits. Further, it is alleged that the Petitioners have not exhausted statutory and internal dispute resolution mechanisms available to them, before invoking jurisdiction of the Court. They have not fully engaged the Interested Party under the Labour Relations Act. They have failed to submit to the internal organs of the 2nd Respondent. In **Constitutional Petition Number 280 of 2017 between Council of Governors v Lake Basin Development Authority & 6 others**, the Court ruled that Parties ought to exhaust statutory and alternative dispute resolution mechanisms available to them, before approaching the Court.

39. Article 27 of the 2nd Respondent's Constitution creates a Dispute Resolution Committee [DRC], made up of 7 Persons. Each disputant appoints 3 Members, while the NEC appoints 1 Member. NEC appointee serves as the Committee Chairman. NEC adopts the resolution of the DRC. The ultimate decision lies with the Annual Conference. Decisions made by the internal organs are appealable before the Conference. The Petitioners opted to operate outside the Union's Constitution.

40. The Respondents pray the Court to dismiss the Petition with costs to the Respondents.

41. The questions arising out of this dispute, as understood by the Court are:-

- a) Is the Amended Petition properly before the Court?
- b) Have the Petitioners approached the Court under the correct legal regime, and is the Petition as a whole sustainable?
- c) Did the Respondents infringe Petitioners' fundamental rights and freedoms by removing the Petitioners from Office?

d) Have the Respondents acted in contempt of the orders of the Court?

e) Do the Petitioners merit the remedies sought?

The Court Finds:-

[a]. Amended Petition

42. The Petitioners persuaded the Court to allow them, to amend their Petition. The Court recorded an order on 14th December 2017, which deemed the Petition as duly filed. To expedite hearing and disposal of this high octane Petition, Respondents were directed to file their Response to the Petition. Parties thereafter, filed and highlighted their Submissions.

43. The Petitioners do not deny that they did not pay the requisite filing fees with regard to their Amended Petition. The order by the Court, supposing the Amended Petition as duly filed, did not exempt the Petitioners from paying Court fees.

44. They ought to have brought it to attention of the Court that they had not paid Court Fees, and asked the Court to deem the Amended Petition duly filed, only upon payment of the requisite Court Fees.

45. The Constitution of Kenya [Protection of Rights and Fundamental Freedoms] Practice and Procedure Rules 2013 demand, under Rule 33, that there shall be paid in respect of all proceedings under the Rules, the same Court Fees payable in respect of civil proceedings in the High Court. Rule 34 states that a Person who wishes to be exempted from paying Court Fees, may apply for exemption from the Registrar of the Court. Rule 10 [2] of the Employment and Labour Relations Court [Procedure] Rules 2016 requires payment of requisite Court Fees, upon deposit of Pleadings at the Court Registry. Rule 39 stipulates that fees chargeable shall be as shown under Schedule 2. The Court may, under Rule 39 [2] where satisfied that a Party does not possess sufficient means, give an order for waiver of Court Fees.

46. The Petitioners did not seek to be, and were not exempted from paying Court Fees. They did not pay Court Fees on the date the Court supposed their Amended Petition as duly filed. They failed to validate the Amended Petition by paying the requisite fees. Courts have held that Pleadings are not validly filed, until the requisite Court Fees have been paid. The Court did not examine whether the Petitioners paid Court Fees. Courts do not ordinarily enquire whether Parties have paid Court Fees on filing of Pleadings, unless the issue is disputed or in any other way, brought up to the attention of the Court. The Petitioners had an obligation to pay Court Fees on the date the order was made in their favour, to validate the Amended Petition.

47. The Amended Petition on record is, as pointed out by the Respondents, an annexure marked as ‘MSH 4,’ in the Affidavit of the 1st Petitioner. It does not even appear to be signed, and dated by the Petitioners’ Advocates. Although Constitutional Petitions fall within special jurisdiction, and can assume the form of informal documentation, letters, or oral applications reduced into writing by the Judge, disclosing denial, violation, infringement or threat to a right or fundamental freedom, the Supreme Court has, in *Deynes Muriithi & 4 others v. Law Society of Kenya [2016] e-KLR*, cautioned that it does not mean simply because this is a special jurisdiction, formalism should be discarded. It does not mean for instance that rules of evidence, swearing of witnesses, cross-examination of witnesses, and signing of pleadings should be ignored. It cannot mean that Parties have discretion in payment of Court Fees. The Amended Petition is not properly before the Court. The order which supposed the Amended Petition to have been duly filed cannot stand, upon careful reconsideration by the Court, as it was not validated by its beneficiaries, the Petitioners herein, through payment of requisite fees and signing of the Amended Petition by Petitioners’ Advocates. ***The Amended Petition is hereby struck off the record.***

[b] Filing Procedure/ sustainability of the Petition.

48 The Court must however look at the Petition as originally filed. There are Supporting Affidavits filed by the Petitioners with the Petition, on 29th June 2017. The Petitioners make it clear under paragraphs 20 and 22 of their respective Affidavits that they seek conservatory orders, and quashing of all the decisions made by the Respondents, *after hearing of the Petition*. The Court understands the Affidavits to support the prayer for conservatory orders, as well as the substantive Petition. The Respondents submission that there is no Supporting Affidavit to the Petition is incorrect. There is no Rule in the Constitution of Kenya [Protection of Rights and Fundamental Freedoms] Practice and Procedure Rules 2013, or in the Employment and Labour Relations Court [Procedure] Rules 2016, which prevents a Petitioner from relying on the same Affidavit in support of Application for conservatory orders, and in support of the substantive Petition. After all, the facts are the same. Courts have an obligation to expedite hearing and disposal of Constitutional Petitions, and filing of a single Affidavit which can serve both the Application and the Petition, expedites hearing of the Petition. The Respondents’ position that the Petition is not supported by Affidavit has no merit.

49. Prior to the promulgation of the Constitution of Kenya in 2010, Judicial Review remedies were an appendage of administrative law. After 2010, their character changed. The remedies became entrenched in the Constitution. They became administrative as well as constitutional remedies.

50. In the Civil Courts, Sections 8 and 9 of the Law Reform Act, Cap 26 the Laws of Kenya provided the lone substantive basis for Judicial Review. Order 53 of the Civil Procedure Rules was the procedural law regulating Judicial Review.

51. Section 12 [repealed] of the Labour Institutions Act 2007, gave the Industrial Court power to judicially review *any decision taken or any act performed by the State in its capacity as Employer, on such grounds as are permissible in law*. The Industrial Court [Procedure] Rules 2010 regulated proceedings under this specialized jurisdiction.

52. In both jurisdictions, the power of Judicial Review has always been a way of enforcing the rule of law, and ensuring Administrators function in accordance with the law.

53. The New Constitution of Kenya extended the scope of Judicial Review, changing the character of the remedies under Judicial Review. The Constitution expressly provides for Judicial Review, with the remedies no longer confined to correcting the wrongs committed by Public Authorities; Judicial Review remedies are available against private Persons, such as the Respondents. The Constitution of Kenya acknowledges that the capacity for infringement of fundamental rights and freedoms is not a preserve of the State. Non-state actors such as the Respondents herein, are, under our Constitution, capable of infringing fundamental rights and freedoms, hence the widening of the scope of Judicial Review under the Constitution. Article 10 of the Constitution of Kenya, binds all State Organs, State Officers, Public Officers and **all Persons**, whenever any of them applies or interprets the Constitution; enacts, applies or interprets any law; and makes or implements any public policy decisions. Section 3 of the Fair Administrative Action Act makes it clear that the Act, [and therefore Article 47 of the Constitution] binds all State, and Non-State Actors, including any Person whose action, omission or decision affects the legal rights or interest of any Person to whom such action, omission or decision relates. The inclusion of **'any Person'** in this Act underlines the importance of the term **'all Persons'** used under Article 10 of the Constitution. There is no line drawn between Private Persons and Public Authorities in this definition. The Court can think of no reason why the Fair Administrative Action Act, cannot apply to Trade Union Officials and Organs, in their dealing with fellow Officials and Members. In dealing with the Petitioners, the 1st and 2nd Respondents purported to apply the 2nd Respondent's Constitution. The 1st Respondent acted under the authority conferred on him by the 2nd Respondent's Constitution and the Labour Relations Act. The Respondents discharged a quasi judicial function, which required them to treat the Petitioners fairly. The substantive provisions in the Fair Administrative Action Act, crystallize the concept of fair administrative actions, and can be applied broadly, in other relationships, beyond the relationship of the State and its Citizens.

54. Constitutional Lawyer, **Elisha Ongoya**, in his paper **'The Changing Character of Judicial Review and Statutory Order in Kenya,'** argues that Judicial Review is *'the rule of law in motion.'* Rule of law is a core national value under the Constitution, and Article 10 provides an indirect relationship between the Constitution and Judicial Review. Ongoya explains there are also, instances of direct recognition of Judicial Review under Article 23 of the Constitution, which he describes as the remedial appendage to Article 22. Article 47, which has formed the bulk of the Parties' Submissions, contains prescriptions which fit the recognized ground for Judicial Review. Another Constitutional Lawyer, **Ochiel J. Dudley**, in his paper **"The Constitution of Kenya 2010 and Judicial Review: Why Odumbe Case Would Be Decided Differently Today,"** strongly argues that Judicial Review's entrenchment as a constitutional principle, should of necessity expand the scope of remedies under Judicial Review.

55. Dudley illustrates this using the **High Court Case of R v. Kenya Cricket Association [KCA] ex-parte Maurice Odumbe, [2006] e-KLR.** Odumbe was a Kenyan cricket star. He was accused, and found guilty, of colluding with gamblers to fix the outcome of a cricket game. The KCA, acting under the authority of the International Cricket Council [ICC], found Odumbe guilty and banned him from the game, for 5 years. When Odumbe sought the remedy of Judicial Review at the High Court, the High Court declined to review the decision of KCA/ ICC. The rationale was that KCA/ICC had not performed duty of a public nature. Their source of power, nature of duty and impact did not amount to performance of public function. This is the same argument presented by the Respondents in this Petition: that they are private entities/ persons, whose actions against the Petitioners, were of a private nature, not amenable to correction through Judicial Review. Dudley argues that with the entrenchment of Judicial Review under the Constitution, access to the remedy can no longer be hindered by public-private power dichotomy. The test is no longer whether exercise of power is private or public, or whether the Administrator is private or public; the test is whether the Administrator exercises judicial or quasi-judicial power. Quasi-judicial is defined as: having a partly judicial character by possession of the right to hold hearings on, and conduct investigations into disputed claims and alleged infractions of rules and regulations; and to make decisions in the general manner of the Courts. The Fair Administrative Action Act applies to State and Non-State Actors and includes any Person. Section 3 [1] [c] states the Act applies to any Person, whose action, omission or decision affects the legal rights or interests of any Person to whom such action, omission or decision relates. This progressive interpretation has support in **Supreme Court of Kenya, CCK v. Royal Media Services Limited [2014] e-KLR.** Dudley concludes that the Constitution of Kenya has provided reason to discard the original characterization of Judicial Review as a mere instrument of checking governmental power. He holds the position that Odumbe would have obtained the remedy under the Constitution of Kenya, without being hindered by the private-public power dichotomy.

56. In **Nairobi High Court Petition Number 336 of 2015, Masai Mara [SOPA] v Narok County Government,** the Court held that since the promulgation of the Constitution in 2010, administrative law actions and remedies were subsumed in the Constitution. This can be seen in the eyes of Article 47 which forms part of the Bill of Rights. The Court held further that there is now substantive constitutional judicial review when one reads Article 47 as to the right to fair administrative action alongside Article 23 [3], which confers power on the Court hearing an Application for redress of a denial or violation of a right or freedom in the Bill of Rights. Order 53 does not apply to Constitutional Petitions, where the Court is expected to exercise a special jurisdiction which emanates from the Constitution, and not a Statute. The Court rejected Respondent's objection to the filing of the Petition, arguing filing had been done in contravention of Order 53. This decision of the High Court of Kenya is identical with the decision of the Constitutional Court of South Africa, **Pharmaceutical Manufacturers of South Africa in re ex-parte President of the Republic of South Africa & Others, 2000 [2] SA 674 [CC] at 33,** where it was held that: the common law principles that frequently provided grounds for Judicial Review of public power have been subsumed under the Constitution. The same phrase *'subsumed under the Constitution,'* is used in the Kenyan and the South African decisions. The South African Court held there are no two separate systems of Judicial Review, but one system, shaped by the Constitution. In **Republic v Public Procurement Administrative Board ex parte Syner- Chernie Limited [2016] e-KLR,** the High Court at Nairobi held that Judicial Review which is based on constitutional imperatives, fundamentally alters Judicial Review as traditionally and formerly known in common law and legal circles. The High Court concluded also, that Section 10 [1] of the Fair Administrative Action Act 2015 eschews undue regard to procedural technicalities in the same language as Article 159 of the Constitution.

57. The Respondents herein argue that: the Petition is incompetent; the Petitioners ought to have distinguished Judicial Review under the Fair Administrative Action Act 2015 from a Constitutional Petition; and they ought to have filed a pure civil action under the Fair Administrative Action Act. The Petition does not clearly plead the fundamental rights and freedoms alleged to have been infringed. The Respondents cite **Anarita Karimi Njeru v the Republic [1976-1980] KLR 272,** and **John Kamau Mwangi v Town Clerk Kangema [2007],** in support of this submission. The Respondents do not say what specific ways the Petitioners have failed in their pleadings. There are Rules which regulate filing of Petitions, and which the Respondents ought to show, have not been complied with, in urging the Court to reject the Petition for want of specificity. There is no need to cite **Anarita Karimi Njeru v the Republic** and other decisions which relate to the retired Constitution. The Respondents appear to veer into the territory of legal ancestor worship, by looking at the Constitution of Kenya 2010, through the eyes of our forefathers. The reliance on principles of constitutional interpretation drawn from the old Constitution, and the overindulgence in citation of Judicial Authorities from another epoch to apply in a modern-day constitutional dispute, is profoundly misplaced. The Respondents' submission that they cannot be subject to Judicial Review proceedings because they are private

persons/entities, and that the Petition is defective in procedure, is a position which appears to be based on originalism. In the words of the High Court, in the case of **Republic v Public Procurement Administrative Board ex-parte Syrner- Chernie Limited**, the Respondents look at Judicial Review through the eyes of the common law, and as was traditionally known in the legal circles. To them, Judicial Review must remain confined to grant of prerogative writs, where the High Court directs the behaviour of another arm of the Government or Subordinate Court. These writs must issue according to the laws which governed judicial review proceedings prior to August 2010. Judicial Review as traditionally known in legal circles, must not be merged with constitutional remedies, and must not apply to, or against, private persons/entities such as Trade Unions, their Officials and Members. The Respondents have, adopting their originalist approach, but without any degree of conviction, argued in sections of their Submissions, that the Employment and Labour Relations Court does not have the power of Judicial Review. **Albert Einstein** said: "we cannot solve our problems with the same thinking we used, when we created them." The **Australian Judge, Michael Kirby**, characterizes originalism, as 'ancestor worship,' in his Article, "**Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?**" [2000] *MelbULawR1* [2000] 24[1], *Melbourne University Law Review*. The Constitution and the Law in general, must be viewed in the eyes of today's generation. The Judge terms originalism as a quaint and primitive form of ancestor worship, a quaint ritual, which should not be allowed to travel to the Antipodes and capture imagination of Judges. The 2nd Respondent is a Trade Union, and Trade Unions are private entities. In the past, they would not have any obligation under fair administrative actions law, and would not be amenable to the remedies under Judicial Review. The times have changed. The law recognizes the concept of fair administrative actions by private persons [see *The Fair Administrative Action Guide, Katiba Institute 2018*]. Article 10 of the Constitution of Kenya, in the view of the Court, agrees with the current trend in international human rights law, recognizing that State and Non-State Actors can violate human rights, and should therefore be amenable to Judicial Review. In the case of **Ken Saro-Wiwa against Royal Dutch Shell Petroleum Company**, it was widely agreed that corporations have human rights responsibility for violations initiated by them, or violations carried out in collusion with the State. The Oil Company colluded with the Nigerian Government in environmental degradation of Ogoniland, human rights violations and eventual capture and murder of Ogoni Leader Ken Saro-Wiwa. The Bhopal Gas Tragedy in India left thousands of Employees and other Members of the Public dead and injured. The accident took place in 1984. Its devastating effects are still felt in that part of India today. The disaster was blamed on poor maintenance of the industrial plant by Union Carbide Corporation. This corporate negligence resulted in dire violation of fundamental labour, human and environmental rights. In other areas, Corporations have been held responsible for engaging in forced labour and torture. These are violations the Constitution of Kenya under Article 10 seeks to redress, through its reference to **all persons**, in defining the scope of its application. The same intention can be read under Section 2[ii] of the Fair Administrative Action Act, which defines 'administrative action' to include any action, act, omission or decision of **any person**, body or authority that affects the rights or interests of any person to whom such action relates. Trade Unions, and their Officials, are not exempt from the Fair Administrative Action Act.

58. The Court does not think the Petition is incompetent. Judicial Review remedies are an integral redress for denial and violation of fundamental rights and freedoms under the Constitution. The Fair Administrative Action Act 2015, is not meant to limit access to these remedies, but is meant to illuminate the concept of fair administrative actions under Article 47, and enhance the path to accessing constitutional protection. The older laws governing Judicial Review, such as the Law Reform Act and Order 53, of the Civil Procedure Rules are still in place. They have not been repealed through the Fair Administrative Action Act. The Court thinks it is intended, that Parties have a wide choice in access to justice. Parties can approach the Court for Judicial Review as a pure civil remedy or as constitutional remedy. The route to the Court, that best suits the Parties, is left for the Parties to determine. There are various routes, not a single route, to accessing constitutional protection. A Petition cannot be thrown out simply because a Petitioner has invoked an enabling statute, and failed to meet the procedural standards of the enabling statute. Articles of the Constitution are capable of taking effect through a multiplicity of statutes. The Fair Administrative Action Act 2015, though enacted to give effect to Article 47, should not be viewed as the statute that exclusively gives effect to Article 47. Section 12 of the Act states the Act is in addition to and not in derogation from the general principles of common law and rules of natural justice. There are other laws which codify principles of common law, and in their own ways, give effect to Article 47. The Employment Act 2007, which is very strong on principles of procedural fairness, equity and rules of natural justice, gives effect to Article 47. So does the Labour Relations Act, which requires Administrators such as the Registrar of Trade Unions, to act fairly in registration and regulation of Trade Unions. Trade Unions have their own Constitutions, made pursuant to the Labour Relations Act, which demand there is fair dealing amongst Officials, their Unions, and Union Members. The Dock Workers Union has a Constitution which embraces democratic and accountable governance. It creates organs, offices and has checks and balances aimed at ensuring there is dispersal of power within the Union, protecting the Union from falling into the clasp of oligarchs. As long as the Union conducts its business according to its Constitution, Public Authorities such as the Registrar of Trade Unions and the Courts, are not allowed, and have no reason, to intervene. The 2nd Respondent's Constitution embraces the national values contained in Article 10 of the Constitution of Kenya, in particular, rule of law. Its Preamble states that the 2nd Respondent is committed to: values of social justice; building of a democratic, member-driven, member-friendly and vibrant trade union which protects its members; efficient service delivery; and recognizes the gender, age and cultural diversity of members. The 2nd Respondent's Constitution enumerates its values and principles to include promotion of democracy, built on the spirit of trade unionism; respect for the Constitution of the Union and any values made under it; mutual respect; fair treatment of all without discrimination; freedom and full participation of members in policy formulation, decision-making and activities; affirmative action in situations of historical injustices; integrity, transparency and accountability; competent performance by officials of their roles and duties; and promotion or affiliation and solidarity with other Organizations and Workers, nationally, regionally and internationally. These principles and values, read in their totality, echo the understanding of the terms 'fair administrative actions' and 'rule of law' given by Courts and Constitutional Scholars, discussed by the Court elsewhere in this Judgment. The principles and values imposed on the Respondents the obligation to act fairly, lawfully, reasonably and if required, give reasons for their various decisions. It is not just that Petitioners were denied a fair hearing; they were deprived of the right to fair administrative action, under Article 47. This is how fair administrative justice should function, as held in the Court of Appeal decision in **Judicial Service Commission v Mbalu Mutava & Another [2015] e-KLR**. Article 47 of the Constitution would not be moribund, in relation to this dispute, without the Fair Administrative Action Act. The Constitution of the 2nd Respondent, as shown in its Preamble, Principles and Values, and Articles, gives effect to Article 47 of the Constitution of Kenya, bringing the remedies of Judicial Review within the reach of the Petitioners. Application of Article 47 of the Constitution is realized through the 2nd Respondent's Constitution, even without having to make reference to Acts of Parliament. The Petitioners claim more than just orders under Judicial Review; they claim other fundamental rights and freedoms were infringed. They identify the associational rights and freedoms under Article 41 to have been infringed. Clearly, this has been established by the Petitioners. The Petitioners were damned for questioning the financial decisions of their General Secretary; they were condemned unheard; they were given sanctions which are not created by the 2nd Respondent's Constitution such as suspension and validation; they were told they had been suspended and/or removed, recalled before the Organs of the 2nd Respondent after being removed; 3rd to 6th Respondents were imposed on the 2nd Respondent, to take up the jobs given by the Members to the Petitioners; form Q, unknown to the Petitioners, was forwarded to the Registrar of Trade Unions, to endorse the bloodless coup by the Respondents against the Petitioners; and Petitioners were eventually told

they had been removed from Office and the Union, for no known reason other than their disagreement with the way the 1st Respondent managed the affairs of the 2nd Respondent. Expulsion of Members from an Organization, for their disagreement with Colleagues in leadership, is a form of administrative action which belonged to the era of one-party rule in Kenya. It has no place in modern Organizations, under the modern-day Constitution of Kenya. These actions/ decisions trampled on the Petitioners' fundamental rights and associational freedoms under Article 41. Consequently, the Petitioners seek much more than Judicial Review for infringement of Article 47.

59. The Court is satisfied that the Petition is properly before the Court. Proceedings of this Court are primarily regulated by the Employment and Labour Relations Court [Procedure] Rules 2016. Rule 7 states that a Party, who wishes to institute a Petition, shall do so in accordance with the Constitution of Kenya [Protection of Rights and Fundamental Freedoms] Practice and Procedure Rules 2013. The Rule states also that a Party who seeks Judicial Review shall do so in accordance with Section 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules. The Rules, strangely, do not mention the Fair Administrative Action Act, which was enacted before the Rules came into force. Notwithstanding anything contained in Rule 7 [E&LRC Rules], Parties are at liberty to seek the enforcement of any constitutional rights and freedoms in a Statement of Claim or other Suit filed before the Court. These are the formal standards the Respondents should question, rather than hark back to standards laid down in a decision made in the 1970s. The Rules regulating proceedings of this Court are permissive on filing of Petitions. One does not even have to go through *Mutunga Rules*, to access the constitutional remedies of Judicial Review, at the Employment and Labour Relations Court. A Statement of Claim, or a Suit instituted in any other way, enables a Party access to constitutional remedies. The Petition herein meets the procedural requirements under the Constitution of Kenya [Protection of Rights and Fundamental Freedoms] Practice and Procedure Rules 2013, and the Employment and Labour Relations Court [Procedure] Rules 2016. The Petition is properly before the Court.

[c] Infringement of Petitioners' fundamental rights and freedoms.

60. The Respondents submit that the 2nd Respondent conducted its elections on 12th April 2016. The Petitioners were not in the same camp as the 1st Respondent. According to the Respondents, this left the top leadership of the Union divided. It is the genesis of the dispute herein.

61. The Court agrees with this view, but observes that from the number of disputes brought before the Court relating to the leadership of the Dock Workers Union, the disagreements predate the elections of 12th April 2016.

62. The Petition herein is just one action instigated by a Section of the Leadership of the Dock Workers Union, against another Section. There are other cases the Court has dealt with in the past, while others are pending. The common thread is power struggle, with factions engaged in perennial legal battles, for the control of the mind, soul, leadership and ultimately, resources of the Dock Workers Union. At, or around, the time this Petition was filed, there were several other Causes and Miscellaneous Applications filed by the Respondents, which the Court directed are stayed, pending hearing and determination of the Petition. The Court does not therefore have a significant challenge, in understanding where the Parties are coming from, where they are, and where they hope to be.

63. The 1st Respondent is the undisputed General Secretary of the Dock Workers Union, elected on 12th April 2016. The Petitioners, similarly, are Officials of the 2nd Respondent elected on the same date, as the 1st Respondent. An extract from the Interested Party, shows Mohamed Sheria is the elected Chairman, Joseph Sialo Makero is the Treasurer, and Gunda Kaneno is the Vice-Chairman.

64. The 2nd Petitioner is the National Treasurer of the 2nd Respondent. He is responsible for payments and management of the funds of the 2nd Respondent, subject to the directions of the NEC. His role is central to the running of the Union.

65. He queried the 1st Respondent's financial decisions, relying on the 2nd Respondent's Financial Policy and Procedures Manual. He questioned why Mr. Ochieng', Respondents' Representative in this Petition, is on a retainer fee of Kshs. 100,000 monthly, without a written contract; he enquired why the 1st Respondent prepared and signed a cheque for the sum of Kshs. 250,000 in favour of Advocate Oduor Henry, without involving the 2nd Petitioner; the 1st Respondent wanted the 2nd Petitioner to approve payment of the 1st Respondent's gratuity in monthly installments, rather than in bulk, at the end of the year; and, the 1st Respondent wanted the 2nd Petitioner to approve purchase of a new Sports Utility Vehicle [SUV] for the 1st Respondent's use, while the 2nd Petitioner felt the scarce resources available, should go to purchasing of a much-needed Union Bus, to be used by Union Members. In the view of the 2nd Petitioner, the 1st Respondent as the CEO of the 2nd Respondent, already had a suitable official car availed to him by the 2nd Respondent.

66. These, in the view of the Court were genuine queries made by the Treasurer in fulfillment of his role under the 2nd Respondent's Constitution. There are documents exhibited by the Petitioners establishing that these queries were made. The 2nd Petitioner was well within his mandate under the 2nd Respondent's Constitution and the Financial Policy, to ask these questions.

67. The 2nd Petitioner was out of the Country briefly, between 1st October 2016 and 21st October 2016, to attend Joint Industrial Council benchmarking activities. The 2nd Petitioner's Assistant travelled with him. NEC nominated alternate Trustee Katana Kenga to act on behalf of the Treasurer for the period the Treasurer was away.

68. The Court does not find the Respondents to have acted in breach of 2nd Respondent's Constitution in nominating Katana Kenga as Treasurer. The operations of the 2nd Respondent would grind to a halt without access to funds.

69. Actions taken by Katana Kenga in the absence of the Treasurer, which included payment of the 1st Respondent's gratuity as desired by the 1st Respondent, were validly taken. Katana Kenga exercised the role of Treasurer, and cannot be faulted for acceding to the request made by the 1st Respondent, in the absence of the Treasurer and Assistant Treasurer. He was validly nominated to relieve the 2nd Petitioner, and his decisions bound the 2nd Respondent. The Court does not think that in the absence of the Treasurer and his Assistant, financial operations, should have been kept in abeyance.

70. Katana Kenga's acting role however, should have ended on 21st October 2016 upon return of the substantive treasury Officials. There is evidence that he went on discharging the role, at the prompting of the 1st Respondent, after 21st October 2016. He processed payment in the sum of Kshs. 2.7 million, for purchase of the 1st Respondent's SUV, a transaction which the 2nd Petitioner had resisted from the outset, and which was reversed only after the 2nd Petitioner convinced the Manager Mombasa Port Sacco, that there was no change in signatories to the 2nd Respondent's Accounts. The retention of Katana Kenga by the 1st Respondent, as acting Treasurer, and his discharge of functions of this Office, after 21st October 2016, had no justification. The 1st Respondent appears to have co-opted Katana Kenga to the treasury to enable the 1st Respondent achieve certain ends inimical to the 2nd Respondent, which the 2nd Petitioner had doggedly prevented the 1st Respondent from achieving.

71. The reversal of payment of Kshs. 2.7 million in purchase of a SUV seems to have rankled the 1st Respondent. This led to a series of wrongful actions and decisions by the 1st Respondent, which is the subject matter of this Petition.

72. NEC convened on 6th April 2017 and resolved to have the 2nd Petitioner removed from Office. The Court has not seen any Article in the 2nd Respondent's Constitution which explicitly empowers the NEC to remove elected Officials from Office. The Representative for the Respondents has repeatedly argued in this Petition, that Officials are removed through elections, and that the Petitioners are, or were at the time the argument was presented, still in Office. Why would NEC allege to have removed the 2nd Petitioner? The decision of NEC was forwarded to the Interested Party for endorsement. It was rejected by the Interested Party for failure to meet the requirements of the 2nd Respondent's Constitution.

73. The 1st Respondent wrote to the 2nd Petitioner on 9th May 2017 advising the 2nd Petitioner that his suspension as National Treasurer had been validated. Another letter dated 11th May 2017 followed, this time advising the 2nd Petitioner that his removal as National Treasurer had been validated and the 2nd Petitioner was no longer allowed to transact any business on behalf of the 2nd Respondent. The Respondents have not shown the Court any Article in the 2nd Respondent's Constitution, or provision of the law, under which removal and/ or suspension of the 2nd Petitioner from Office, was based.

74. Although he was variously told he had been removed and suspended in the month of April and May 2017, the 2nd Petitioner was again required on 2nd June 2017, to appear before NEC, to answer to unspecified allegations. Why was he required to reappear before NEC, while he was already removed and/ or suspended, and these decisions 'validated?'

75. The 2nd Petitioner was invited to attend a meeting of Joint Industrial Council [JIC] on 27th and 28th June 2017. The 1st Respondent sent the 2nd Petitioner text message informing the 2nd Petitioner that the 2nd Petitioner's name had been struck off the list of the 2nd Respondent's Representatives in the JIC. The invitation letter, from the Employer Kenya Ports Authority, and the text message of the 1st Respondent to the 2nd Petitioner, have been availed to the Court.

76. The chain of actions and decisions taken by the 1st Respondent and NEC against the 2nd Petitioner were plainly in violation of the 2nd Petitioner's right of fair administrative action, his right to join and participate in lawful activities of a Trade Union, and against rules of natural justice. Not only were these decisions capricious, illogical, unreasonable, ambulatory, and irrational; they were made without affording the 2nd Petitioner the opportunity to state his position. There was no line drawn between suspension and removal with the 2nd Petitioner recalled before the NEC, even after he had been told that removal and suspension had been validated. Where did the Respondents find these terms- suspension and validation - from? They are not in the Constitution of the 2nd Respondent. The 1st Respondent acted in contravention of the 2nd Respondent's Constitution, the Labour Relations Act on removal of Officials, the substantive provisions of the Fair Administrative Action Act, the Constitution of Kenya and rules of natural justice. The Respondents were always aware that the 2nd Petitioner was an elected Official who could not be removed in the wishy-washy manner adopted by the Respondents. Even when the Interested Party rejected form Q, the 1st Respondent was not deterred from taking further adverse decisions against the 2nd Petitioner.

77. The 1st Petitioner as stated elsewhere is the elected National Chairperson of the 2nd Respondent. His functions under Article 17 of the 2nd Respondent's Constitution include presiding over all meetings and conferences at which he is present; enforcing observance of the 2nd Respondent's Constitution and Rules; and authorizing payments out of 2nd Respondent's funds. His role, like that of fellow National Officials, is very important to the democratic governance of the 2nd Respondent. He is elected, he is a Member of nearly every other organ of the Union, and his removal from Office is not intended to happen at the drop of a hat.

78. His evidence is that the 2nd Petitioner brought to the 1st Petitioner's attention, the glaring financial anomalies attributed to the 1st Respondent. The 1st Petitioner and his Co-Petitioners attempted to convene a Management Committee under Article 13 [2] of the 2nd Respondent's Constitution. The 1st Respondent dismissed the Petitioners' call for intervention of the Management Committee.

79. On or around 20th June 2017, the 1st Petitioner found out that NEC had met on 18th May 2017 and alleged to remove the 1st Petitioner from office. It was also resolved that 3rd to 6th Respondents act as National Officials in place of the Petitioners. The 1st Petitioner did not attend the NEC meeting as he was away in Geneva on official duty. NEC meeting under the 2nd Respondent's Constitution, Rule 12 [3] [b], must be called by the Chairman and the General Secretary. None was available to call NEC meeting. Removal of a Member of the NEC can only be done by the National Conference.

80. The 1st Petitioner later learnt from the Interested Party that the 1st Respondent had presented form Q, asking the Registrar to effect removal of the Petitioners. The Interested Party rejected this.

81. On 29th May 2017, the 1st Respondent summoned the 1st Petitioner to appear before NEC, notwithstanding that a resolution had already been made, removing the 1st Petitioner from Office. The 1st Petitioner protested upon his return from Geneva and was advised NEC meeting had been deferred to an undisclosed date. The 1st Petitioner like the 2nd Petitioner was a Member of the JIC. He was barred from representing the Union at JIC by the 1st Respondent.

82. The 3rd Petitioner confirms Petitioners took collective action aimed at safeguarding the finances of the 2nd Respondent, a stand that did not curry favour with the 1st Respondent.

83. The 3rd Petitioner was informed by word of mouth that there would be a meeting of the NEC, on 18th May 2017. He attended the meeting. He realized the agenda included the removal of the 1st Petitioner. The 3rd Petitioner insisted discussion of the 1st Petitioner takes place, only in the presence of the 1st Petitioner. His chair [the physical chair] was pulled from under him; he was jeered; and insulted by fellow NEC Members. He excused himself from the chaos. Later, he learnt it was resolved that he is removed from Office alongside his Co-Petitioners. He associates himself fully with the position taken by his Co-Petitioners on violation of the Constitution of Kenya, the Constitution of the 2nd Respondent, the Labour Relations Act, and the Fair Administrative Action Act.

84. It must be asked whether at the end of the day, the Respondents acted fairly, lawfully and reasonably, within the meaning of the term 'fair administrative action' given by the Court in **Judicial Service Commission v. Mbalu Mutava & Aother [2015] e-KLR**. Did they act in a manner that promotes rule of law and democratic governance in the Dock Workers Union? Are the decisions taken by the Respondents against the Petitioners, consistent with Article 41 of the Constitution? Can the Respondents be said to have honoured the Preamble, Principles and Values, and Articles contained in the 2nd Respondent's Constitution? Have they respected their fellow Officials, who were elected alongside the 1st Respondent, to lead the 2nd Respondent nationally about 2 years ago? The 1st Respondent marshaled NEC, and other Organs of the 2nd Respondent, to take hasty and obviously flawed actions and decisions. Whenever it became apparent that a wrong action had been taken and wrong decision had been made, the 1st Respondent attempted to correct the situation through other wrong actions and decisions. 3rd to 6th Respondents were imposed on the 2nd Respondent. They may be elected Officials of the 2nd Respondent, but they were not elected to the positions held by the Petitioners. They aided the 1st Respondent in contravening the 2nd Respondent's Constitution. Fortunately for the 2nd Respondent, the Interested Party did not give her endorsement to decisions made by the Respondents, through registration of form Q.

85. Trade Unions Leaders do not have to agree on every issue affecting the running of their Union. They may be of different persuasions, but should work in accordance with their Constitution and Internal Rules, respecting the Organs of their Union, the Law and the Constitution of Kenya. The 2nd Respondent's Constitution calls for Officials of the Union to respect each other. It advances the concept of unity in diversity. It recognizes cultural diversity. The 2nd Respondent's Leadership would however be parochial, to form camps around the coastal/upcountry lineage. The Port and the Dock Workers' Union, represent the broad spectrum of the Kenyan People. No one should overlook the mandate given by the electors to National Officials; overlook the dispersal of power; disregard the checks and balances; and concentrate power singularly in his hands. Without checks and balances, without divergence of views among the National Officials, the 2nd Respondent stands to wither and fall, for lack of democratic space. The Leaders of the Dock Workers Union ought to respect each others' mandates, and not seek to alter the decision made by the electors at the ballot box. The Petitioners, like General Secretary Sang', were elected in 2016. Why would there be such spirited attempts at removing them from Office, even before they have completed half of their 5 year-terms? It is not just one National Official whose removal is desired, but 3 National Officials, who include the National Chairman.

86. The submission by the Respondents, that they did not have adequate notice of the complaints raised by the Petitioners, is not supported by the documents availed by the Parties, to the Court, and is rejected by the Court.

87. There is similarly no persuasion in the argument that the Petition is premature, the Petitioners having not exhausted Internal Dispute Resolution Mechanisms, and the Labour Relations Act. The Internal Organs of the 2nd Respondent were demonstrably prone to manipulation and did not show objectivity, or instill confidence, whenever engaged by the 1st Respondent to deal with the Petitioners. NEC made a series of mind-boggling decisions. The Dispute Resolution Committee did not act in a manner that portrayed impartiality and independence. While the law requires exhaustion of internal dispute resolution mechanisms before resort to Court, it would be unreasonable to expect a wronged Party to exhaust such mechanisms, where these mechanisms are not objectively and fairly administered. The Court does not see what the Petitioners were expected to do, and failed to do, to be deemed to have submitted themselves to 2nd Respondents Internal Dispute Resolution Mechanisms. They asked for intervention of the Interested Party when the Respondents attempted to register form Q. Registration was declined by the Interested Party. What more were the Petitioners to do under the Labour Relations Act, so as to be seen to have fully complied with dispute resolution mechanisms? The Petitioners were not willing to accept the decision of the Interested Party. They submit the Interested Party acted injudiciously, in rejecting form Q. Yet, they float the submission that the dispute ought to exclusively be dealt with, by the Interested Party.

Contempt and remedies

88. Contempt of Court involves a legal process, and is quasi-criminal in nature. The issue was brought up in the Amended Petition which the Court has concluded, was not properly filed. The Court is not therefore obliged to adjudicate on this issue, but it should be noted no specific order of this Court is shown to have been served upon the Respondents, and contemned by the Respondents. No specific contempt proceedings have taken place. If the Petitioners felt any orders of the Court were flouted, they ought to have pursued the Respondents for contempt, in proper contempt proceedings. The Respondents are shown to have acted in violation of the Petitioners' fundamental rights; and they may have taken ill-advised actions meant to frustrate, in their strategic thinking, the possible outcome of the Petition. Such violations and actions fall short of contempt of Court. There were no proper proceedings in the nature of contempt of Court, and consequently, no proof that contempt of Court took place. A mere notice given to a Party, to the effect that a lawsuit is pending, cannot without evidence of any specific orders made by the Court, and shown in proper contempt proceedings to have been flouted, result in a finding of contempt of Court. The Petitioners mention the doctrine of *lis pendens* in their Submissions. They did not establish the doctrine of *lis pendens*, show that it is applicable in this Petition, and show how it is associated with contempt of Court. The Court is not able to find the Respondents in contempt.

There is no legal basis for punishing the Respondents. There is no basis to order the 1st Respondent to pay punitive damages to the Petitioners. The allegation that the Respondents acted in contempt of Court, was raised in an Amended Petition which the Court has concluded, was not properly filed. There were no proceedings in any event, in the nature of contempt proceedings which took place.

89. Looking at the remedies sought in the Petition filed on 29th June 2017, the Court finds it is unsuitable to award compensation to the Petitioners against the Respondents. Ultimately, monetary award against the 2nd Respondent, and its Officials, would have to be paid from Members' Funds. The Petitioners are Officials of the Union and come before this Court, on a platform of financial propriety and protection of Members' Funds. It is not conscionable for the Petitioners to benefit financially from Members' Funds. The Petitioners are still Officials of the Union, and their hope is that they shall continue serving, in accordance with their electoral mandates, until they are lawfully removed from Office. Monetary award is not in the interest of the Members, the Union and its Officials. In concluding, the Court must exhort the Leadership and Membership of the Dock Workers Union, as the Court has done in past litigation, to come together and reason together.

90. The Court finds other prayers are merited. The decision made by NEC on 6th April 2017 was followed by other decisions, all creating a single chain of violation of Petitioners' fundamental rights and freedoms. It is this chain of violations, rather than specific and individual violations that must be broken. Underlying all actions and decisions taken by the Respondents, was the spirited intention to remove the Petitioners from Office, by whatever means. That must be redressed through effective remedies. The High Court in *Nancy Makokha Baraza v Judicial Service Commission of Kenya & 9 Others [2012] e-KLR*, defined the powers of the Court, in considering the range of constitutional remedies, as unrestricted, which allows the Court to make appropriate orders, and grant remedies as the need arises. The Petitioners cite Articles 22 and 23 of the Constitution in presenting this Petition. Under Article 23, the Court may grant any appropriate relief, including the reliefs specified under Article 23. The remedies are not exclusive. There are various Orders sought, which the Court finds can be reduced, and are granted in the following terms:-

a) It is declared that the various actions and decisions of the 1st Respondent, the 2nd Respondent and 2nd Respondent's Officials and Organs, against the Petitioners, variously characterized as removal and suspension from Office, validation, and removal from the roll of membership and from the Joint Industrial Council, made on 6th April 2017, and on subsequent dates, were in contravention of the Petitioners' fundamental rights and freedoms under Article 41 and 47 of the Constitution of Kenya.

b) It is declared those actions and decisions are unlawful, unreasonable, ambulatory, unconstitutional, null and void, and of no legal effect, and shall not be acted upon by the Interested Party. For avoidance of doubt, these actions and decisions are called to this Court, and are hereby quashed in their entirety, through an order of certiorari.

c) It is declared that the Petitioners remain National Chairman, National Treasurer and National Assistant Chairman of the 2nd Respondent respectively until, their electoral mandates expire, or until otherwise lawfully and constitutionally removed from Office.

d) It is ordered that the Chairman and the Treasurer, shall continue with their roles as signatories to 2nd Respondent's Bank Accounts; authorize payments out of 2nd Respondent's funds; and in general supervise the financial affairs of the 2nd Respondent alongside other authorized Officials, under Articles 17 and 19, of the 2nd Respondent's Constitution.

e) It is ordered that 3rd to 6th Respondents shall not replace the Petitioners as National Chairman, National Treasurer, and National Assistant Chairman, unless the 3rd to 6th Respondents are elected to the respective Offices by Members, or unless otherwise 3rd to 6th Respondents are lawfully and constitutionally placed into the respective Offices

f) Under the prayer for any other suitable orders, the Court orders that the Petitioners shall remain Members of the 2nd Respondent, and continue to discharge their respective roles as Members of the Joint Industrial Council, until they lawfully and constitutionally cease to be Members, and to hold Office, in the 2nd Respondent Union.

g) Considering the views of the Court on monetary awards expressed above, there shall be no order on the costs.

h) The document described to be an Amended Petition is expunged from record.

Dated and delivered at Mombasa this 28th day of September, 2018.

James Rika

Judge