



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**PETITION NO. 11 OF 2018**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF VRIGHTS AND FUNDAMENTAL FREEDOMS IN ARTICLES 19, 20, 21, 22, 23, 27, 41(1), (2) (c), 41(4) (a), 47 (1) & (2) OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF THE CONSTITUTION IN ARTICLES 2, 3(1), 10, 35, 36(1), 50 (1), 73(1) (a), (2)(b), (2) (d), 75, 79, 232, 258, & 259**

**IN THE MATTER OF ARTICLE 3(1) & 3(2) OF THE ILO CONVENTION NO. 87 CONCERNING FREEDOM OF ASSOCIATION AND PROTECTION OF THE RIGHT TO ORGANISE**

**IN THE MATTER OF ARTICLE 22& 26 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS**

**IN THE MATTER OF ARTICLE 8 OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS**

**IN THE MATTER OF ARTICLE 23(4) OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS**

**IN THE MATTER OF SECTION 12(1) & (2) OF THE LABOUR INSTITUTIONS ACT, 2007**

**IN THE MATTER OF SECTION 8 OF THE LABOUR RELATIONS ACT**

**JOANES OKOTH.....1<sup>ST</sup> PETITIONER**

**WILLIAM OPONDO.....2<sup>ND</sup> PETITIONER**

**SAMUEL MUNGUTI.....3<sup>RD</sup> PETITIONER**

**LIVINGSTONE ABUTA.....4<sup>TH</sup> PETITIONER**

**SIMON ISULUTI.....5<sup>TH</sup> PETITIONER**

**BALLON MWENI.....6<sup>TH</sup> PETITIONER**

**JOHN OYUGI OGALO.....7<sup>TH</sup> PETITIONER**

**MOHAMMED MWAMBIRE.....8<sup>TH</sup> PETITIONER**

**- VERSUS -**

**THE REGISTRAR OF TRADE UNIONS.....1<sup>ST</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**AND**

**KENYA HOTELS & ALLIED WORKERS UNION.....1<sup>ST</sup> INTERESTED PARTY**

**DIRECTOR OF PUBLIC PROSECUTION.....2<sup>ND</sup> INTERESTED PARTY**

**THE INSPECTOR GENERAL OF POLICE.....3<sup>RD</sup> INTERESTED PARTY**

(Before Hon. Justice Byram Ongaya on Friday 16<sup>th</sup> November, 2018)

**JUDGMENT**

The petitioners filed the petition on 16.02.2018 through Wetaba, Were, & Associates. The petition challenged the elections of the 1<sup>st</sup> interested

party said to have been held on 06.04.2016. The reliefs sought were as follows:

- a) A declaration that the communication dated 04.03.2016 of the union and the subsequent alleged election held at Paris hotel was in contravention of the 1<sup>st</sup> respondent's directive on communication of venue of the elections making any election so conducted a nullity.
- b) A declaration that the existence of two election dates both lodged with the 1<sup>st</sup> respondent nullified any election so held before the clarity of the legitimate election date was established or rescinding of one or both dates.
- c) A declaration that the circumstances surrounding the elections of the union warranted the 1<sup>st</sup> respondent to invoke sections 35 (3) and (4) of the Labour relations Act, 2007.
- d) A declaration that the 1<sup>st</sup> respondent's conduct with regard to conducting of the union election violated Articles 10, 41, 73, and 75 of the Constitution, Articles 3(1) and (2) and 8(2) of the ILO Convention Concerning Freedom of Association and Article 26 of the international Covenant on Civil and Political Rights, 1966 and was an abdication of her statutory role.
- e) A declaration that failure by the 1<sup>st</sup> respondent to make communications on why the various objections as were lodged were never taken into consideration was a violation of Article 47 of the Constitution with regard to fair administrative action.
- f) A conservatory order reinstating status quo of the situation before elections of branch officials of the interested party pending the holding of elections within the next 30 days after granting of this order.
- g) A conservatory order reinstating status quo of the situation before elections of the leadership of national officials of the interested party pending the holding of elections within the next 30 days after conclusion of branch elections as envisaged in clause (f) above.
- h) A declaration that the position of Acting Secretary General, Acting National Executive Board Members, Acting National Treasurer as registered by the 1<sup>st</sup> respondent were a violation of the 1<sup>st</sup> interested party's constitution.
- i) A declaration that all resolutions and done by the Acting Secretary General as registered by the 1<sup>st</sup> interested party are a nullity and the same be nullified.
- j) Conservatory orders reinstating status quo as per the 1<sup>st</sup> respondent's letter dated 28.03.2014.
- k) Costs be awarded to the petitioners.

The petition was based on the supporting affidavits of Joanes Okoth, Livingstone Abuta, William Opondo, Simon Isuluti and Balon Mweni Kazungu all filed together with the petition.

The respondents filed the replying affidavit of E.N Gicheha (the Registrar of Trade Unions) on 19.03.2018 through the Honourable Attorney General.

The undisputed petitioner's case is that section 8(2) of the Labour Relations Act, 2007 states that every union has a right to hold elections to elect its officials. Under section 34 (1) of the Act, the elections of trade union officials shall be conducted in accordance with the union's constitution. Section 34 (4) of the Act provides that disputes arising from, or connected directly or indirectly to, elections held under this section may be referred to the Court.

The petitioners' grievance is as follows. On 04.12.2013 a section of the 1st interested party purported to hold a national executive board meeting in absence of key officials and proceeded to suspend them and introduced the post acting secretary general who was duly registered whereas such position did not exist in the 1<sup>st</sup> respondent's constitution. It was alleged that some signatures of the officials purportedly at the meeting were not genuine and some strangers attended the meeting. The petitioners were further aggrieved that they were condemned unheard because they were not notified about the meeting. The petitioners' case was that the 1<sup>st</sup> respondent failed to act upon the grievances and returns for 1<sup>st</sup> interest party were registered.

The petitioners' further case was as follows. The 1<sup>st</sup> respondent issued a notice on 25.11.2015 directing all trade unions to conduct elections

by 30.08.2016. Directive 5 of the notice required that election committees must communicate in writing to the Commissioner of Labour and the 1<sup>st</sup> respondent the venue of the elections at least 21 days before the date of the elections. The 1<sup>st</sup> interested party's secretary general raised issues on 14.03.2016 about how the elections were being conducted including fraudulent registration of the Naivasha branch. The 1<sup>st</sup> respondent was requested not to be in haste to register the election outcomes until after clarifications were made. Further funds to convene the national executive board to discuss modalities of carrying out the elections had not been made available.

The petitioners' further case was that the election was conducted on 06.04.2016 (as communicated by the deputy secretary general) at a venue different from where the elections ought to have been held. The venue communicated as per directive 5 was the COTU headquarters but the change to Paris Hotel did not conform with the directive. Further the 1<sup>st</sup> interested party's secretary general had communicated that elections would be held on 25.06.2016 but that was not to be. The petitioners lament that the 1<sup>st</sup> respondent was notified about the 2 election dates, one by deputy secretary general and the other one by the secretary general and the election as held ought to have been nullified. The 1<sup>st</sup> respondent was notified and she directed that the 1<sup>st</sup> interested party had to decide on the proper date.

The elections were held on 06.04.2016 and communicated to 1<sup>st</sup> respondent on 07.04.2016 and new officials registered on 11.04.2016. A Court order given on 08.04.2016 preserving the status quo was served belatedly. The petitioners' case was that the registrar had failed to exercise patience and interrogate the grievances prior to registering the new officials. They allege that the petitioners' rights were therefore violated under Article 47 of the Constitution.

The 1<sup>st</sup> interested party's case is that on 01.03.2016 its national executive board resolved to hold national branch election for the 1<sup>st</sup> interested party on 06.04.2016. The petitioners' case that there were two election dates is therefore not true. The purported election date of 25.06.2016 for 1<sup>st</sup> interested party's elections was never approved by the 1<sup>st</sup> respondent's national executive board per rule 3.4 of Article VII of the 1<sup>st</sup> interested party's constitution which states, "**The National Executive Board shall be the governing body and shall be responsible for the management of the affairs of the union and shall exercise control over the individual officers at the union.**" The elections were then conducted in accordance with rule 3.2 of the constitution and changes in the venue were communicated promptly to branch secretaries, interested parties and national executive board members as per 1<sup>st</sup> respondent's circular of 25.11.2015 and as per section 34 of the Labour Relations Act, 2007. Thus the 1<sup>st</sup> respondent acted in accordance with the law and discharged her duties as relates to the elections.

The respondents' case is that the 1<sup>st</sup> interested party held elections on 06.04.2016 and the new officials registered on 11.04.2016. If the petitioners were aggrieved with the registration of new officials on 11.04.2016 they ought to have appealed against that registration decision within 30 days from 11.04.2016 as per section 30 of the Labour Relations Act, 2007. Thus the petition had been overtaken by events.

The Court has considered all the material on record and makes findings as follows:

1. The petitioners have failed to show that the purported election date of 25.06.2016 for 1<sup>st</sup> interested party's elections was approved by the 1<sup>st</sup> interested party's national executive board per rule 3.4 of Article VII of the 1<sup>st</sup> interested party's constitution and the Court returns that it was not a valid elections date because it has not been shown to have been arrived at in accordance with the 1<sup>st</sup> interested party's constitution. The Court further finds that the 1<sup>st</sup> respondent's advisory to the petitioners that the 1<sup>st</sup> interested party was to determine the valid date for the elections was in line with section 8(2) of the Labour Relations Act, 2007 which states that every union has a right to hold elections to elect its officials. Further the advisory complied with section 34 (1) of the Act which provides that the elections of trade union officials shall be conducted in accordance with the union's constitution. Accordingly the Court returns that the only valid and lawful date of the 1<sup>st</sup> interested party's national elections was 06.04.2016 and the petitioners have not established a reasonable and lawful justification why the 1<sup>st</sup> respondent should not have registered the new officials on 11.04.2016 in discharge of her statutory duty.
2. The respondents and the 1<sup>st</sup> interested party have established that the grievances the petitioners may have had about the offices in the 1<sup>st</sup> interested party they may have held but lost prior to elections of 06.04.2016 had been subject of previous litigation and, decisions by the Court had been rendered so that the same was *res judicata* and not subject for determination in the present suit. The Court finds as much.
3. The Court returns that the petitioners have not established the violation of their constitutional freedoms and rights as was alleged and they have not justified any of the prayers in the petition. The Court will decline to grant the prayers as unjustified.

In conclusion judgment is hereby entered for the respondents against the petitioners for dismissal of the petition with costs.

**Signed, dated and delivered in court at Nairobi this Friday 16<sup>th</sup> November, 2018.**

**BYRAM ONGAYA**

**JUDGE**