



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
PETITION NO. 36 OF 2018

(Before Hon. Lady Justice Maureen Onyango)

FRANCIS AMINA JUMA.....PETITIONER

VERSUS

REGISTRAR OF TRADE UNION.....1ST RESPONDENT

RAPHAEL OUMA OLALA.....2ND RESPONDENT

JUDGMENT

The Kenya Petroleum Oil Workers Union (KPOWU) is a trade Union registered under the Labour Relations Act with membership drawn from the petroleum industry. The position of Secretary General in the Union fell vacant following the death of the immediate past Secretary General in October 2017. Following succession wrangles in the Union, a consent order was recorded in court on 20th December 2017 in Cause No. 2429 of 2017 in the following terms –

1. That this dispute is referred to the Registrar of Trade Unions to assist the parties to resolve the issue of who becomes the acting National General Secretary between the two deputies, in accordance with the Union's constitution and to supervise substantive elections of National General Secretary within three months.
2. That for avoidance of doubt, the 1st respondent is not eligible to hold the office of acting National General Secretary according to the Union's constitution as this position can only be held by a Deputy National General Secretary
3. That parties at liberty to move court for any further or other orders/directions.

On 17th January 2018, the 2nd respondent was elected and subsequently registered as the Acting General Secretary of the Union.

The decision of the 1st Respondent to register the 2nd Respondent as acting General Secretary was challenged by some members of the Union in Appeal No. 1 of 2018 where this Court (Makau J.) held that the 1st Respondent could not be faulted for having registered the 2nd Respondent as Acting General Secretary since the appellants had not demonstrated to Court that the issue of ineligibility of the 2nd Respondent was brought to the attention of the 1st Respondent prior to her decision to register the 2nd Respondent as General Secretary.

It is the petitioner's case that pursuant to the court order of 20th December 2017, he expressed his interest and applied for the position of Secretary General of the Union vide his letter dated 20th January 2018, which he addressed to the Acting Secretary General, the 2nd respondent and duly delivered on 22nd January 2018.

He avers that the 2nd Respondent did not only decline to respond to the application to contest for the post of General Secretary, but also failed to notify the members of the Union of the date and venue locking out any member of the union interested in the position to apply and contest for the same.

On 9th March 2018, the Respondents held an election in which the 2nd Respondent who was the only candidate was elected unopposed as the national General Secretary of the Union.

Prior to the elections of 9th March 2018 the 1st Respondent was notified by some members of the Union of the ineligibility of the 2nd

Respondent to contest or hold the position of National General Secretary of the Union. The 1st Respondent replied to the members' letter vide a letter dated 8th March 2018.

The Petitioner states that the election and subsequent registration of the 2nd Respondent as General Secretary of the Union violated the Constitution of the Union, the Labour Laws and the Constitution of Kenya, 2010.

The Petitioner claims that he was aware that prior to being elected General Secretary, the 2nd Respondent was also registered by the 1st Respondent as Deputy National General Secretary and Coast Branch Secretary, positions that he was also not eligible to hold. That the election of the 2nd Respondent as the National General Secretary and his earlier registration as Deputy General Secretary and Branch Secretary Coast region were procured through fraud and dishonesty and the 2nd Respondent was not and is still not eligible to hold any elective or appointive office in the Union.

The petitioner avers that the 2nd Respondent is now doing everything within his powers to access and control the Union's funds and to this end he has forged a letter purporting the same to have been written and signed by one of the Union's bank account signatories instructing the bank to include him as a signatory to the account.

That the 2nd respondent is already holding himself out to the public generally and to all the relevant stakeholders as the General Secretary of the Union and the Petitioner is apprehensive that unless restrained, the 2nd respondent may conduct himself in such a way as will cause the Union and its members to be liable to third parties who may innocently fall victims to his acts of commission or omission.

That the 2nd Respondent unlawfully opened a bank account with the National Bank of Kenya, Nkrumah Branch, Mombasa, in the name of the Union without the knowledge or authority of the Union and the national office and without having the said account designated in a notice issued by the Minister or Cabinet Secretary contrary to Section 50 of the Labour Relations Act.

That the 2nd Respondent has been fraudulently receiving into and withdrawing funds from the account which funds the petitioner believes are paid by persons who are honestly but mistakenly misled by the 2nd Respondent into believing that they are paying the Union. That the 2nd Respondent then withdraws the money and misappropriates the same for personal benefit and unless restrained by this Court, the 2nd Respondent will continue to cause funds meant for the Union to be deposited into this account for his own private gain.

That contrary to the provisions of the Labour Relations Act and the Constitution of the Union both of which provide that all monies received by the Branches is the property of the Union, the 2nd Respondent utilizes all the money for his personal and private gain and the Union still has to finance the whole budget and all activities of the Coast branch through the Head office.

That the 2nd Respondent is hurriedly and unlawfully seeking to reorganize the leadership and administration of the Union so as to have his cronies unlawfully installed into positions of leadership in order to suit his own selfish interests and to enable him retain his unlawful ascendancy to office.

The petitioner has set out the particulars of fraud on the part of the 2nd respondent are as follows: -

- i. Extract from the 1st Respondent's register shows that the 2nd Respondent was appointed as Secretary, Coast branch on 6th February 2011.
- ii. Another extract shows that on 20th August, 2016 entries were made to the 1st Respondent's register where once again the 2nd Respondent became Coast branch Secretary yet the 2nd Respondent has never been elected or appointed as the Coast Branch Secretary.
- iii. It is on record that Coast branch elections were scheduled to take place on 31st January, 2016 then pushed to 13th February, 2016 but the same did not take place on either date. See paragraphs 5 and 8 of a copy of the judgment of this court sitting in Mombasa.
- iv. The Coast branch elections have never been held to date yet the 2nd Respondent fraudulently and dishonestly presented his name alongside others to the 1st Respondent for registration as the duly elected Coast branch officials in 2011 and 2016.
- v. Opening a bank account in the name of the Union but without the knowledge and approval of the Union or the national office.
- vi. Opening a bank account in the name of the Union without the account being designated through a notice issued by the Minister/Cabinet Secretary for the time being responsible for labour matters.
- vii. Receiving funds into the said bank account but refusing to remit or transfer the funds to the national bank account of the Union
- viii. Withdrawing cash from the bank account for personal use rather than for Union activities.
- ix. Failure to account for the funds received and spent.
- x. Failure to notify the National office of the existence of the bank account.

xi. Continuing to demand and receive financial support from the head office in respect of the entire budget for the Coast branch while keeping the details of the account a secret and utilizing the funds collected for private gains.

xii. Forging a letter and signature of one of the Union's bank signatories and purporting that that signatory has instructed the Union's designated bank, the Standard Chartered Bank, Moi avenue Branch, Nairobi to include the 2nd Respondent as a signatory to the Union's designated bank account.

It is the petitioner's case that the extracts from the 1st respondent's register show that the 2nd respondent was appointed as Secretary, Coast Branch on 6th February 2011 and again on 20th August 2016 yet there were no elections. That branch elections scheduled for 31st January 2016 were pushed forward to 13th February 2016 but eventually did not take place.

As for the 1st respondent, the petitioner avers that by promptly entering the name of the 2nd respondent in the register and failing to address complaints. She disenfranchised the petitioner and other members and further violated his right to fair administrative action under Article 47 and right to equality before the law under Article 27. That the 1st respondent further violated his freedom of association under Article 36.

Further, the petitioner avers that his statutory rights under Section 4(2), 31(1) and (4), 34(1), (2)(a), (4) and (5) of the Labour Relations Act were violated. Section 4(2) provides for an employee's right to freedom of association. Section 31 provides for eligibility of persons to become officials while Section 34 provides for election of officials. Section 50 provides for all Union dues to be paid into the designated account of the Union, which the petitioner avers the 2nd respondent failed to do.

Besides the Constitution and Labour Relations Act, the petitioner avers that the 2nd respondent violated Rules 3, 9:12, 9:16, 11:2, 11:13, 11:9, 11:6, 12:3 and 18:3 of the Union's constitution. The said provisions provide for the following –

Rule 3 restricts membership of the Union to workers employed in the petroleum oil sector where according to the petitioner, the 2nd Respondent has never worked hence is not and could not have been a member of the Union.

Rule 9:12 provides that *"All such decisions shall be recorded in writing by the National General Secretary and kept for future reference."*

Rule 9:16 provides that *"any vacancy occurring in the membership of the National Executive Council in the event of death, resignation or dismissal of any official of the Union before the next Annual Delegates Conference the National Executive council shall fill the vacancy by appointing and confirming a person from among the members of the Union."*

Rule 11:2 provides that: *"Only such members of the Union not in arrears with their subscriptions shall be eligible for elections as National Officials of the Union."*

Rule 11:6 set out conditions precedent to which – *"A non-member wishing to contest the post of a General Secretary deposit into the account Kshs.200,000/= (Two Hundred Thousand shillings). The National Treasurer shall notify the National General Secretary of the same within seven days."*

Rule 11.9 – *"A non-member wishing to contest the post of either National General Secretary or Deputy General Secretary shall bring curriculum Vitae, a letter of good conduct must either be working or have worked in the oil Industry for at least ten (10) years and is in possession of a letter of release from last employer if no longer in employment and must have not been convicted in a court of Law, provided that nothing herein stated shall prevent any Union member of staff wishing to contest such, posts."*

Rule 11:13 provides that *"The National General Secretary shall be responsible for receiving and acknowledging the application forms and letters on behalf of the National Executive Council."*

Rule 12:3 provides that *"The Union shall accept a National General (sic) who has served in the oil industry for a period of not less than ten years or someone who served a trade Union organization as a General Secretary, Deputy General Secretary or Assistant General Secretary for a period of not less than five years. He issue notices of all Conferences and meetings and prepare the Agenda for all conferences and meetings, attend all annual Conference, special conferences and meetings of National Executive Council, Central Council and finance Committee and record the minutes and shall perform such other duties as prescribed by the National Executive Council or the Central Council. He shall prepare the annual report to Annual Conferences and Registrar of Trade Unions. He shall be responsible of ensuring due compliance with Provisions of Trade Unions' related Acts and all regulations made there under by the Union. He shall function as the Chief Executive Officer of the Union."*

Rule 18:3 states that:

"The Treasurer of every branch of the Union shall cause a bank account to be opened in the name of the Union and shall ensure that all money belonging to the Union received by him is paid into the said bank account within seven days of receipt of such monies, provided that a branch Treasurer shall be permitted to retain in cash a sum not exceeding five thousand shillings to pay for minor expenses.

All cheques for withdrawal of money from such branch account shall be signed by, Branch Chairman, Branch Secretary, Branch Treasurer and Branch Assistant Treasurer. All money collected by branches shall be paid from branch funds but the balance of all funds after such ordinary expenditure has been met shall be remitted to the Union National Treasurer at least once every month. All money collected by the branch shall be the property of the Union."

The petitioner further avers that the respondents did not comply with this court's orders of 20th December 2017 to the effect that the position of General Secretary be filled in accordance with the law and the constitution of the Union.

The petitioner avers that the registration of the 2nd respondent as General Secretary is prejudicial to members as he is a stranger and will have access to Union finances and confidential financial information, he will enjoy full access to sensitive, important and confidential Union records and documents which he may misuse and cause irreparable damages to the Union and its members, will cause the Union and its members to become liable to third parties and is hurriedly and unlawfully seeking to reorganise the leadership and administration of the Union to suit his selfish interests and enable him retain his unlawful ascendancy to office.

The petitioner seeks the following orders

1. A declaration that the 2nd Respondent was not and is not eligible to be General Secretary of the Union and his purported election or appointment was unlawful and is hereby nullified with immediate effect.
2. A declaration that the 1st Respondent violated the Constitution, the law and the Constitution of the Union in registering the 2nd Respondent as an official of the Union.
3. A declaration that the Petitioner's right to offer himself for election or appointment as General Secretary of the Union was violated when he was kept in the dark about the appointment that was upcoming and his application not responded to.
4. An order be and is hereby issued directing the 1st Respondent to cancel with immediate effect, the registration of the 2nd Respondent as General Secretary of the Union which was registration was effected on 9th March 2018.
5. An order be and is hereby issued directing the 2nd Respondent to vacate office with immediate effect.
6. An order be and is hereby issued to the Officer Commanding the Station (OCS) within whose jurisdiction the offices of the Union are situate to enforce compliance with Order No. 5 in the event that the 2nd Respondent is not compliant.
7. A declaration that the 2nd Respondent's ascendancy to office as Coast Branch Secretary was unlawful since no elections were ever held to have him elected hence his ascendancy and registration as Coast Branch Secretary was null and void and the same is hereby revoked with immediate effect.
8. A declaration that the rights of the Coast branch members of the Union have been and continue to be violated by the 2nd Respondent who has denied them the chance to vote in leaders of their choice.
9. An order be and is hereby issued directing the 1st Respondent to deregister and remove the name of the 2nd Respondent as Coast branch Secretary with immediate effect.
10. An order be and is hereby issued to the 1st Respondent to deregister and remove the name of the 2nd Respondent from the register of officials of the Union in any capacity including the position of Deputy General Secretary.
11. A declaration that the National Bank of Kenya account opened and held in the name of the Union at Nkrumah branch was fraudulently, unprocedurally and irregularly opened and has been used by the 2nd Respondent and his cronies to swindle Union funds and perpetuate fraud.
12. An order directing the 2nd Respondent to render accounts for all the monies received into the National Bank of Kenya account since the date of opening the account and to remit all that money to the designated Union bank account held at Standard Chartered Bank, Moi Avenue, Nairobi within 60 days from the date of judgment of the Court failing which an audit be carried out in respect of that account and execution to issue against the 2nd Respondent thereafter.
13. A declaration be and is hereby made that the 2nd Respondent procured his registration as Coast Branch Secretary through fraud and is therefore guilty of fraud and dishonesty under section 31 (5) as read together with section 82(1) and (3) of the Labour Relations Act, 2007.
14. A declaration that the 2nd Respondent is guilty under Trade Unions Regulations No. 13(1) as read together with regulation 13(2) of the Labour Relations Act, 2007 for failing to keep and avail the Coast Branch register of members to the members for their inspection even after being ordered by this Honourable Court to do so.
15. A permanent injunction restraining the 2nd Respondent either directly or through his servants, agents or anyone acting under him from involving himself in or interfering in any other manner with the activities and programmes of the Union.
16. A permanent injunction restraining the 1st Respondent from registering the 2nd Respondent as an official of the Union in any capacity.
17. An order directing the Chairman of the Union to convene a meeting of the National Executive Council to appoint a General Secretary in accordance with the law and the Union Constitution within 60 days from the date of this judgment.

18. Damages for violation of the Petitioner's rights.

19. Costs of the Petition.

20. Any other or further orders that the Court may deem fit to grant in the interest of justice

The petition is supported by the affidavit of the petitioner sworn on 2nd May 2018 in which he reiterates the averments in the petition.

1st Respondent's Case

The 1st respondent, the Registrar of Trade Union opposed the petition and filed an affidavit in which she deposes that she acted within the mandate of her office and the orders of this court requiring her to assist the National Executive Council of the KPOWU to elect an Acting General Secretary and supervised the election of a substantive National General Secretary in compliance with the court order. She deposes that the 2nd respondent was elected as both Acting National General Secretary and substantive National General Secretary respectively, that no appeal was filed by anyone including the petitioner within 30 days as provided in Section 30 of the Labour Relations Act.

The 1st respondent deposes that before the elections of 9th March 2018, the 2nd respondent issued a notice to both the National Executive Committee members and the general members of the Union but the petitioner did not present himself for election. She deposes that the petitioner not being a member of the Union's Coast Branch cannot raise any issues over the management of the Coast Branch of the Union as he did not produce any mandate to do so.

She deposes that the 2nd respondent has been an official of the Union's Coast Branch for 20-11 as Branch Secretary, and Deputy General Secretary from 2016 before his election to the position of National General Secretary.

She deposes that the petition is a disguised appeal following the failure of the petitioner to file appeal as provided in the Act and the petition is brought in bad faith, is without merit and should be dismissed.

It is submitted by the 1st respondent that a court of law is clothed with jurisdiction by statute and not by craft of tenuous interpretation as was held by the Supreme Court in the case of **S. K. MACHARIA -V- KENYA COMMERCIAL BANK AND OTHERS** when it held –

"A court's jurisdiction flows from either the constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."

The 1st respondent submitted that once a court of law finds that it lacks jurisdiction, it must down its tools' forthwith and do no more. In the owners of the **MOTOR VESSEL LILIAN 'S' -V- CALTEX A. C. (KENYA) LIMITED [1989 KLR 1** (at page 14) the Court of Appeal held –

"Without jurisdiction, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

The 1st respondent further relied on the case of **JOSEPHAT NDIRANGU VS HENKEL CHEMICALS (EA) LTD (2013) eKLR**, (Mombasa Industrial Court Petition 1 of 2013), Radido Stephen J. held that:

"... a litigant should not avoid the provisions of the Employment Act regarding unfair termination or wrongful dismissal by going behind the statute and seeking to rely directly on Art 41 of the constitution on the Right to fair Labour Practices. The purpose of this constitution is that the right to fair labour practices is given effect in various statutes of which the Employment Act and Labour Relations Act are Primary.

The Primary legislation should not be circumvented by seeking to rely directly on a constitutional provision. Both the Employment Act and the Labour Relations Act give effect to constitutional rights.

It is clear to mind that the Claimant filed the Petition after realizing that the cause he had filed was under legal attack and there was not any legal defence to the attack on the ground of time Bar."

On the issue whether it is an offence for KPOWU, Mombasa Branch to open or operate a bank account, the 1st respondent submits that Rule 10:3 of the Constitution provides "the Treasurer of every branch of union shall cause a bank account to be opened in the name of the union..." The 1st respondent submits that the petitioner's allegations of misappropriation of union funds are not substantiated.

2nd Respondent Submissions

The 2nd respondent filed a replying affidavit and submissions in opposition to the petition. It is the 2nd respondent's case that petitioner he is not stated the constitutional provisions he relies on as required in Rule 10(2)(c) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice Procedure Rules which provides that a petition shall disclose the constitutional provisions that is violated, infringed, threatened or denied, the nature and extend of the violation and the level of injury. He submits that the rights under Article 41 and

operationalised by Section 4 of the Labour Relations Act which provides that –

4. Employee's right to freedom of association.

(1) Every employee has the right to –

(a) participate in forming a trade union of federation of trade unions;

(b) join a trade union; or

(c) leave a trade union.

(2) Every member of a trade union has the right, subject to the constitution of that trade union to -

(a) participate in its lawful activities;

(b) participate in the election of its officials and representatives;

(c) stand for election and be eligible for appointment as an officer or official and, if elected or appointed, to hold office; and

(d) stand for election or seek for appointment as a trade union representative and, if elected or appointed, to carry out the functions of a trade union representative in accordance with the provisions of this Act or a collective agreement.

He submits that the petitioner is not a member of the KPOWU. He invites the court to peruse document of the petition or at page 69 to 100 containing the list of genuine members printed by the petitioner's employer the Kenya Pipeline Company Limited which does not include the petitioner's name. He avers that page 101, 102 and 103 contain the inserted name of the petitioner as a fraudulent attempt to prove membership. He submits that row no 25 originally belongs to a retired member Mr. Kairu Karanja (Company No. 1430) as shown in Exhibit AJ. 1 but the name has been craftily replaced by the name of Francis Juma, the petitioner who however forgot to allow the corresponding amount of dues payable which remained Kshs.1,837.

The 2nd respondent submits that he requested for a copy of the petitioner's payslip which would provide proof of membership but the counsel for the petitioner declined the request.

The 2nd respondent further avers that the receipt of Kshs.200,000 is further proof of non-membership of the petitioner as it is paid on 13th December 2017, before the elections notice was issued while he expressed interest on 20th January 2018, a month after the alleged payment. It is further the 2nd respondent's submission that the petitioner is a Senior Manager at Kenya Pipeline Company Limited in J.G. 6 and not eligible to be a member of the union.

On his own eligibility it is the 2nd respondent's averment that he worked full time with the KPOWU from 2004 in different capacities including organising secretary, Coast Branch Secretary, Assistant General Secretary, Acting General Secretary and now General Secretary.

He further avers that he is the current Coast Branch General Secretary duly elected and registered from February 2011, that there has been no complaint of misappropriation of funds, fraud, incompetence or disquiet of any nature save for an elections dispute in 2016. He submits that the Coast Branch Account at National Bank Mombasa was procedurally and duly opened with blessings from the National office, minutes containing branch resolutions and all necessary documents required by the bank, that the bank account is majorly used to receive court awards on behalf of members for onward transmission to the claimants and beneficiaries. He urged the court to strike out documents from National Bank of Kenya which were obtained without authority or court order by the petitioner, as the Branch Secretary – Coast Branch is not party to these proceedings.

He further points out that the petitioner has not singled out any transactions that he alleges to be fraudulent in the statements of the Coast Branch Bank Account of the Union that he filed in court.

He further submits that the financial and secretarial documents of the Union are subject to annual audit and inspection by the 1st respondent who has never found any fault with the same.

On the applicable law the 2nd respondent submits that the Labour Relations Act and the union's constitution cannot form the basis of a petition citing the case of **SMW –V- GMK** in which the court cited the case of **JOHN KIMANI MWANIGI –V- TOWN CLERK KANGEMA** (unreported) in which the court stated –

“Our Courts have over the years established that for a party to prove violation of their rights under the various provisions of the Bill of Rights, they must state the provision of the Constitution allegedly infringed in relation to them, the manner of infringement and the nature and extent of that infringement...The reason for this requirement is two fold; first the respondent must be in a position to know the case to be met so as to prepare and respond to the allegations appropriately. Secondly, the jurisdiction granted by section 84 of the Constitution is a special jurisdiction to enforce specific rights which are defined by each section of the bill of rights. It is not a general jurisdiction to enforce all rights known to man but specific rights defined and protected by the Constitution. It is not sufficient to rely on

a broad notion of unconstitutionality but rather point to a specific provision of the Constitution that has been abridged”

He submits that the Petitioner has overly relied on a broad spectrum of unconstitutionality which is best fitting as an appeal against a decision of the 1st Respondent or just a normal claim in the Court where Labour Relations Act and Union Constitution would be the basis of argument. He urges that the petitioner’s allegations and claims do not qualify to be filed as Petition.

The respondent submits that that this Court must save itself from the embarrassment of adjudicating on issues that are not appropriately phrased as justiciable controversies. That the issues raised herein are so insubstantial and so attenuated that the Hon. Court lack any remedy for the Petitioner other than dismissing the Petition forthwith. D.S. Majanja (J) agreed with Decision in “**TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE VERSUS ATTORNEY GENERAL AND OTHERS**, Nairobi Petition No. 229 of 2012 and that the court finds this position as applicable in the present petition.

That the Petitioner’s submissions at paragraph 54(a) expresses the provision correctly that the exercise was not for Non-members like himself but properly accommodated the 2nd Respondent being the then Deputy General Secretary as in Rule 9:7 that provides that:

“That National Executive Council shall appoint a Deputy General Secretary or a person from among the members of the Union if any vacancy occurring in the membership of National Executive Council, In the event of death, resignation or dismissal of any Official during any period between any Conferences ”

Determination

Having considered the petition and the affidavit and documents in support thereof, the replying affidavits and the submissions, the issues arising for determination are the following –

- 1) Whether or not the 2nd respondent is eligible to hold the position of the General Secretary of the KPOWU.
- 2) Whether the petitioner’s rights were violated by the respondents.
- 3) Whether the 2nd respondent’s ascendency to the office of Coast Branch Secretary was unlawful.
- 4) Whether the opening of the Cost Branch Bank account was fraudulent and whether the 2nd respondent is guilty of any financial propriety.
- 5) Whether the petitioner is entitled to the orders sought.

Eligibility of 2nd Respondent

The petitioner avers that the registration of the 2nd respondent as the National General Secretary as well as, his earlier registration as Deputy General Secretary and Branch Secretary were procured through fraud as he was and still is not eligible to hold any elective or appointive office in the union.

It is the petitioner’s submission that the 2nd respondent has never worked within the petroleum oil sector and is not a member of the union and therefore not eligible.

Rule 11.00 of the union’s constitution provides for conditions for being a national official. Rule 11:9 provides that –

“A non-member wishing to contest the post of either National General Secretary or Deputy General Secretary shall bring curriculum Vitae, a letter of good conduct must either be working or have worked in the oil Industry for at least ten (10) years and is in possession of a letter of release from last employer if no longer in employment and must have not been convicted in a court of Law, provided that nothing herein stated shall prevent any Union member of staff wishing to contest such, posts.”

[Emphasis added]

This means that the conditions on membership do not apply to employees of the union.

The 2nd respondent has stated that he worked in a petrol station for two years before joining the employment of the union as organizing secretary in 2004 and from there moved up the ranks to the position of Assistant General Secretary before being elected as Acting General Secretary and subsequently as General Secretary. He submits he has therefore worked in the sector for more than 15 years.

The Labour Relations Act at Section 33 provides that no person shall be a voting member of a trade union unless that person is employed in the sector for which the trade union is registered.

Section 31 provides for officials as follows –

31. Officials

(1) The officials of a trade union or employers' organisation shall be persons who are, or have been, engaged or employed in the sector for which the trade union or employers' organisation is registered.

(2) No person shall be an official of more than one trade union or employer's organisation.

(3) An official of a trade union may also be an official of a federation of trade unions to which the trade union is affiliated.

(4) Notwithstanding the provisions of subsection (1) –

(a) the general secretary of a trade union or the chief executive or association secretary of an employers' organisation may be a person not engaged or employed in the sector concerned;

(b) a person may be an official of more than one employer's organisation; and

(c) the Registrar may, on application by a trade union or employers' organisation, permit any other office to be filled by a person not engaged or employed in the sector concerned.

(5) No person who has been convicted of a criminal offence involving fraud or dishonesty shall be an official of a trade union or employer's organisation.

From the foregoing, all officials of trade unions must be persons who are or have been employed or engaged in the sector. The 2nd respondent having been engaged in the sector first as an employee of a petrol station and thereafter as an employee of the union, was eligible to become an official of the union and as an employee of the union, he was eligible to vie for an elective position.

The same issue of the 2nd respondent's eligibility issue was raised by counsel for the petitioner vide letter dated 7th March 2018 and vide her letter dated 8th March 2018 the 1st respondent responded as follows –

“Ref: MEACL&SP/TU/46/ 14/ 51

8th March 2018

Ongoya and Wambola Advocates

P.O. Box 10586 – 00200

NAIROBI

Attention: Dismas Wambola

Dear Sir

RE: THE KENYA PETROLEUM WORKERS UNION - ELECTION OF NATIONAL GENERAL SECRETARY

Reference is made to your letter Ref. OW/MSS 18/04 dated 8th March 2018, just a day before the scheduled elections of 9th March 2018.

Regarding the issues raised, I wish to address you as follows:-

1. The Labour Relations Act 2007, Section 31(4)(a) provides that the General Secretary of a trade union may be a person not engaged or employed in the sector concerned.

Where the constitution of the union provides otherwise, it should be reviewed to align with the provisions of the law.

2. The said RAPHAEL OLALA and your client FRANCIS MONARI have been Deputy General Secretaries since the elections of 2016 and the issue of their eligibility in office has never been raised until now. In fact, according to our records, they were elected to this position in 2015 and were again re-elected in 2016.

3. The two officials NAFTALI KORIR and EVANS ODHIAMBO are an Executive Board Member and National Trustee respectively. In this respect, you may wish to obtain a copy of the union's Extract from our office.

4. If there have never been any genuine elections in the union as you allege your clients should have raised objections or gone to court to seek redress which they have not done.

5. Further, and as you may be aware, the elections of the Acting General Secretary and the forthcoming elections are in compliance with the court's direction to our office in Cause 2429 of 2017.

SIGNED

E. N. GICHEHA (MRS)

REGISTRAR OF TRADE UNIONS

As is pointed out in the letter, no objection had been raised over the eligibility of the 2nd respondent as provided in the Labour Relations Act.

The same was again raised in Petition No. 1 of 2018. In the judgment dated and delivered on 7th March 2018, the very date on which Mr. Wambola wrote to the Registrar, the court dismissed the averments on eligibility of the 2nd respondent to hold office as premature as no objections had been raised with the 1st respondent over the issue as required by the Act.

I may add that the same applies to this petition as pointed out by both the 1st and 2nd respondents. No objections have been raised by the petitioner with the 1st respondent over the election or registration of the 2nd respondent as General Secretary of the union within 30 days as required by law. This court's jurisdiction should only be invoked in the form of an appeal against the decision of the Registrar (the 1st respondent herein). To this extent, the submissions by the respondents that this petition was filed to avoid the provisions of the Labour Relations Act on objections to registration of officials is valid.

From the foregoing, I find that the 2nd respondent was by virtue of both the Labour Relations Act and the Constitution of Kenya Petroleum Oil Workers Union, eligible for election as General Secretary.

This also settles issue No. 3 above that is, the question whether the 2nd respondent's ascendency to the office of Coast Branch Secretary was unlawful.

The next issue is whether the 2nd respondent fraudulently opened the Coast Branch Bank account and if he has misused the funds of the Branch

As is evident from petitioner's own documents, and as submitted by both the 1st and 2nd respondents, the Constitution of the union provides for opening and maintenance of Bank accounts by branches. Rule 18:3 provides that the Treasurer of every branch of the union shall cause a bank account to be opened in the name of the union. At page 14 of petitioner's Further Lists of Documents are minutes of a meeting of Coast Branch of the union held on 21st June 2014 at which a resolution was passed under Agenda No. 3 for opening of branch bank account with the Branch Secretary, Branch Chairman and Branch Treasurer as signatories.

At page 20 is a letter from the then National General Secretary Gilbert Amolo (deceased) authorizing the opening of the account. The other documents in the bundle are the official bank account opening documents.

The allegation of the petitioner that the bank account was fraudulently opened is thus unfounded. So is the allegation that the funds were misused. The petitioner annexed statements of account but did not pinpoint any withdrawal that was not authorized or that was misused.

I find the allegations of both fraudulent opening of Coast Branch bank account and misuse of funds have not been proved by the petitioner

The next issue is whether the petitioner's constitutional rights have been violated by the respondents

As has been pointed out by the 2nd respondent, the basis of the petition herein is the constitution of the union and the Labour Relations Act. Article 41(2)(c) of the Constitution which the petitioner has cited provides for the right to form, join or participate in the activities and programs of a trade union. The petitioner avers that his right as a member of a union to participate in the union elections as a candidate for the position of General Secretary was violated when the 2nd respondent declined to respond to his application and notify him of the date, venue and time of the elections.

Both the 1st and 2nd respondents have denied the averments. The 1st respondent who supervised the elections confirms that notices went out to members as required by law. The 2nd respondent states that the petitioner is not a member of the union as his grade at Kenya Pipeline Company at J. G 6 locks him out of union membership and therefore he was not eligible to vie for the position of General Secretary by virtue of the constitution of the union. The 2nd respondent further questions the payment of membership fees of Kshs.200,000 by the petitioner if he was already a member as alleged in the petition. The 2nd respondent submitted that the petitioner's name was inserted in the list of members, that he asked for a pay slip of the petitioner which would reflect deduction of union dues and the same was declined and further that there are discrepancies in the list of documents at pages 101 to 103 of the petitioner's bundle of documents.

The 2nd respondent further wondered why the petitioner expressed his interest on 20th January 2018 before the notice for the elections was issued.

The Constitution of the union provides at Rule 11:5 that –

“Applications for the National posts... shall be submitted in writing to the National General Secretary two weeks prior to the date of Annual Delegates Conference.”

The petitioner did not demonstrate that after writing his letter dated 20th January 2018 he made any follow up to confirm if the letter was received and if a date had been set. The 2nd respondent denies ever receiving the letter from the petitioner who did not explain the mode of

delivery of the letter.

A party can only be accused of violating another's rights or fundamental freedoms if they are aware of the rights. Without proof that the petitioner's letter was received by the 2nd respondent, he cannot accuse the 2nd respondent of denying him the right to participate in the elections. The petitioner has further not rebutted the averments of the 2nd respondent that he was not a member of the union by virtue of his job grade

The other violations alleged are of Article 47 on Fair Administrative Action and Article on equality before the law.

The petitioner avers that the 1st respondent disregarded complaints about the 2nd respondent's eligibility. This is not true as the 1st respondent responded to the complaints contained in the letter dated 8th March 2018. The fact that the compliant was rejected does not amount to ignoring the complaint or violation of the petitioner's right to fair administrative action.

In support of his contention of violation of Article 27 the petitioner states that the 1st respondent has always been quick to register the 2nd respondent. The registration of the 2nd respondent by the 1st respondent is not a demonstration of violation of the petitioner's rights under Article 27 of the Constitution.

Whether the petitioner is entitled to the prayers

Having failed to demonstrate any violation of his constitutional rights and having found that the 2nd respondent was eligible to vie for and was elected unopposed as the General Secretary of the Kenya Petroleum Oil Workers Union, further having found no proof of fraud or misappropriation of the funds of Mombasa Branch of the union by the 2nd respondent or any other person, the entire petition must fail with the result that I dismiss the same with costs to the 1st and 2nd respondents.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 2ND DAY OF NOVEMBER 2018

MAUREEN ONYANGO

JUDGE