



REPUBLIC OF KENYA
 IN THE EMPLOYMENT AND LABOUR
 RELATIONS COURT AT MOMBASA
 PETITION NUMBER 7 OF 2016

BETWEEN

MICHAEL OCHIENG' MAGUNGU PETITIONER

VERSUS

- 1. THE REGISTRAR OF TRADE UNIONS
- 2. THE COUNTY LABOUR COMMISSIONER MOMBASA RESPONDENTS

AND

THE SECRETARY- GENERAL, UNION OF KENYA
 CIVIL SERVAN..... INTERESTED PARTY

Rika J

Court Assistant: Benjamin Kombe

B.W. Kenzi & Company Advocates for the Petitioner

Emmanuel Makuto, State Counsel, for the Respondents

Ondindiko & Company Advocates for the Interested Party

JUDGMENT

- 1. The Petitioner seeks, as per his Amended Petition filed in Court on 8th March 2017, to have the elections of the Union of Kenya Civil Servants Mombasa Branch held on 5th October 2016, nullified; the 1st Respondent is restrained through an order of perpetual injunction from registering the newly elected Officials; and fresh elections are held.
- 2. The Respondents filed Grounds of Opposition on 13th March 2017. They also filed a Replying Affidavit sworn by County Labour Officer Joseph Nyaga, on 13th March 2017. Their position is that the Petition is misconceived; the elections were held in accordance with Article 18 [4] of the Union Constitution; the order of injunction is overtaken by events, new Officials having been registered on 26th October 2016; and the Petition infringes the right of the new Officials to a fair hearing, as they are not Parties in this Petition. Mr. Nyaga affirms he presided over the elections fairly, and the candidates who were successful have already been registered as Branch Officials by the 1st Respondent.
- 3. The Interested Party is not opposed to the Petition.
- 4. The Petitioner and the Respondents agreed in Court on the 16th March 2017 to have the Petition considered and determined on the strength of the record. They confirmed the filing and exchange of their Submissions, on 12th June 2017.
- 5. The Petitioner states elections were held on 5th October 2016. The County Labour Officer presided. The Petitioner offered himself for the position of Branch Secretary. He was floored by Bernedette K. Koki. He states this Lady had been declared unfit to run, due to integrity

issues. In support of his complaint on integrity issues, he relies on a letter written by the Interested Party to Koki, dated 20th September 2016. The Interested Party alleged in the letter, that Koki had not accounted for a sum of Kshs. 1.2 million meant to be paid by the Branch as rent. Failure to account meant Koki had no credibility. She was advised she was not cleared to run for the position of Branch Secretary.

6. The Petitioner has other complaints against the election of Koki. The outgoing Branch Secretary Mr. Bebora, who was vying for the position of Committee Member, was allowed to remain inside the voting hall, while other candidates were asked to leave. Voting started at 11.00 a.m. instead of the scheduled hour of 8.00 a.m. The exercise closed at 3.00 p.m. as scheduled. Time lost through late start of the exercise, was not added at the close of the exercise. The candidates were not allowed in the hall during vote counting; Presiding Officers assisted voters in filling ballot papers; one Presiding Officer openly campaigned for preferred candidate; campaigns were allowed on voting day; total votes cast and total spoilt, were not announced; and the 1st Respondent failed to reply to a letter written to her by dissatisfied Parties.

7. The Petitioner reiterates the above narrative in his Submissions filed on 12th May 2017. He submits that the Presiding Officer erred by failing to act on the advice of the Interested Party, barring Koki from running for Office.

8. The Respondents fault the Petitioner for failing to include in his Petition, the registered Officials whose election he wants nullified. It has been affirmed by the Presiding Officer that elected Officials have since been registered. Section 34 [1] of the Labour Relations Act 2007, requires elections are conducted in accordance with the Unions' registered Constitutions. The Petitioner has not attached a copy of the Union Constitution, or shown which provision was violated. No communication was relayed to the Respondents about Koki's ineligibility. It was not the role of the Respondents to determine who the candidates for the various positions were. The ballot papers were delivered by Officials of the Union on 5th October 2016, as stated by Mr. Nyaga in his Affidavit.

The Court Finds:-

9. Section 34 [1] of the Labour Relations Act 2007, requires elections of Trade Union Officials, are held in accordance with Trade Unions' registered Constitutions. The Petitioner has not availed to the Court a copy of his Union's Constitution. He has not shown which provisions of that Constitution were violated, in the conduct of the exercise he seeks to have nullified.

10. The Officials who were elected are not Parties to the Petition. They have been registered as Officials by the 1st Respondent. They include Koki and others. To allow the Petition would result in condemning them unheard.

11. The letter from the Interested Party questioning the integrity of Koki is dated 20th September 2016. It is addressed to Koki. It was not addressed to the Presiding Officer. The ballot papers were presented to the Presiding Officer by the Union Officials. It is illogical to expect the Presiding Officer to have prevented Koki from running for Office, while her name was on the ballot papers which were prepared by the Union. The Petitioner does not in any case disclose if he raised the issue about Koki's eligibility with his Union or the Presiding Officer at the voting hall.

12. The role of nominating, and clearing candidates for elections, did not belong to the Respondents. It was not shown by the Petitioner to belong to the Respondents. It was, and is, a role normally reserved to the Union, exercisable in accordance with its internal Constitution.

13. The allegations, against Koki by the Interested Party about not accounting for funds entrusted to her, were mere allegations which, without substantiation, cannot ordinarily result in ineligibility for election to Office. The Interested Party did not file an Affidavit or give evidence on Koki's ineligibility, and show why her name was on the list of candidates, if she had not been cleared to run by the Union. Declaration of a candidate as being ineligible to run for Office, under most Trade Union Constitutions, is not normally made by an individual Official of a Union. There are internal processes and organs that deal with nomination and clearance of candidates. The letter by the Interested Party to Koki did not disclose if, and when, these processes and organs determined Koki was ineligible. The letter appears inconclusive, calling on Koki to give an explanation on the funds. The Interested Party cites Article 7 [4] [d] of the Union Constitution on expenditure of funds, but does not cite which Article bars a candidate from vying for Office on mere suspicion of wrongdoing.

14. Other complaints are frivolous and were not shown to have any effect on the outcome of the elections. How did the presence of Bebora in the voting hall, if indeed he was present, affect the outcome? As the outgoing Branch Secretary, would he not be expected to offer administrative assistance to the Presiding Officers? Did Bebora interfere with balloting by remaining inside the hall and in what way? How did the late start, and timely closure, of voting affect the outcome? These and other complaints are barefaced frivolities, which had no demonstrable effect on the outcome of the elections. Trade Union elections are not national elections, where every action or omission of the Presiding Officer must be placed under the microscope. The Court is convinced that the Labour Officer presided over the exercise fairly, to the best of his ability, and a fair outcome was actualized. ***The Petition has no merit, and is rejected with no order on the costs.***

Dated and delivered at Mombasa this 24th day of July 2017.

James Rika

Judge