



**REPUBLIC OF KENYA**

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

**PETITION NO 142 OF 2016**

**IN THE MATTER OF ARTICLES 22(1) & 41(2) (C)**

**IN THE MATTER OF AN ALLEGED CONTRAVENTION OF LABOUR RELATIONS:  
PARTICIPATION IN THE ACTIVITIES OF AND PROGRAMMES OF A TRADE UNION  
UNDER ARTICLE 41(2) (C) OF THE CONSTITUTION OF KENYA AND**

**IN THE MATTER OF MISUSE OF MONEY OR PROPERTY OF A TRADE UNION AND  
DEDUCTION OF TRADE UNION DUES UNDER SECTION 47 & 48(2) (6) OF THE LABOUR  
RELATIONS ACT, 2007 LAWS OF KENYA**

**BETWEEN-**

**JOPHINUS MUSUNDI.....PETITIONER**

**VERSUS-**

**THE CABINET SECRETARY, MINISTRY OF EAST AFRICAN COMMUNITY**

**LABOUR AND SOCIAL PROTECTION.....1<sup>ST</sup> RESPONDENT**

**THE BARCLAYS BANK, QUEENSWAY.....2<sup>ND</sup> RESPONDENT**

**KENYA NATIONAL UNION OF NURSES.....INTERESTED PARTY**

**RULING**

1. This ruling flows from a preliminary objection raised by the Interested Party by notice dated 30<sup>th</sup> November 2016. The objection is based on the following grounds:

- a) That the Notice of Motion and Petition offend the principles of *res judicata* and *sub judice*;
- b) That the Petitioner lacks *locus standi* to file the Petition;
- c) That the Notice of Motion and the Petition dated 17<sup>th</sup> November 2016 offend the provisions of Article 22 of the Constitution of Kenya;
- d) That the Notice of Motion and Petition offend the provisions of Article 41(4) (a), (b) and (c) of the Constitution of Kenya;
- e) That the Notice of Motion and Petition are frivolous and an abuse of the court process.

2. On the issue of *res judicata*, the Interested Party submits that the bank signatories whose suspension the Petitioner seeks, were appointed pursuant to a court order in Cause No 1454 of 2014, as consolidated with Causes No 1147 of 2014 and 1545 of 2014, in which the Petitioner was the Claimant and the Interested Party was the 1<sup>st</sup> Respondent. The consolidated causes were heard and determined by a judgment dated 15<sup>th</sup> July 2016

3. The Interested Party also cites Cause No 390 of 2015, in which the Petitioner who was the 1<sup>st</sup> Respondent, was found to be in collusion with the Claimant to file a multiplicity of suits, between the same parties, on the same subject matter and seeking similar reliefs.

4. On the question of *sub judice*, the Interested Party submits that the Petitioner admits the existence of Appeal No 11 of 2014, challenging the decision of the Registrar of Trade Unions to register the current officials of the Interested Party. The Petitioner is an Appellant in the said appeal, while the Interested Party occupies the same position as in the current Petition.

5. The Interested Party also submits that the Petitioner lacks *locus standi* to institute these proceedings because he is not a member of the Interested Party. In this regard, the Interested Party states that the Petitioner has not produced a current pay slip to confirm his membership.

6. Finally, the Interested Party submits that these proceedings offend Article 41(4) of the Constitution which provides that trade unions have the right to determine their own administrative programmes and activities.

7. In his response to the preliminary objection dated 30<sup>th</sup> January 2017, the Petitioner takes issue with the signatory to the notice of objection, David Omulama. The Petitioner denies that the issues raised in the Notice of Motion and the Petition have been the subject of previous litigation before the Court.

8. With specific reference to Appeals No 11 of 2014 and No 6 of 2015, the Petitioner states that the subject matter is with respect to decisions taken by the Registrar of Trade Unions, concerning the leadership of the Interested Party.

9. On the issue of *locus standi*, the Petitioner states that he is a duly paid up member of the Interested Party.

10. In my estimation, the major issue for determination before the Court is whether the issues raised in the current Notice of Motion and Petition are *res judicata* and/or *sub judice*. The Court was referred to Section 7 of the Civil Procedure Act which provides as follows:

***“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and finally decided by such court.”***

11. The Court was further referred to the decision in *E.T v Attorney General [2012] eKLR* in which the Court stated thus:

***“The courts must always be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction.”***

12. The Petitioner does not deny the existence of the previous causes cited by the Interested Party. He however states that the issues raised in the current Petition are different. I have looked at the prayers sought in both the Notice of Motion and the Petition and find that they all have to do with the leadership

of the Interested Party. These issues have been litigated and concluded in the causes cited by the parties. The subject matter is therefore *res judicata* and this Court lacks jurisdiction to reopen it.

13. In view of this finding, the Court finds no need to address the other issues raised in the preliminary objection.

14. In the end, the Petition and Notice of Motion dated 17<sup>th</sup> November 2016 are struck out with no order for costs.

15. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 27<sup>TH</sup> DAY OF OCTOBER 2017**

**LINNET NDOLO**

**JUDGE**

Appearance:

Jophinus Musundi (the Petitioner in person)

Miss Ashubwe for the Interested Party