



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT AT MOMBASA

CONSTITUTIONAL PETITION NO. 11 OF 2017

IN THE MATTER OF: ARTICLES 22 AND 23 OF THE CONSTITUTION OF KENYA, 2010

AND

**IN THE MATTER OF: ARTICLES 10, 19, 20, 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, 2011**

AND

**IN THE MATTER OF: BREACH AND THREATENED CONTINUED BREACH OF THE BILL
OF RIGHTS UNDER ARTICLE 41 AND 47 OF THE CONSTITUTION OF KENYA, 2010.**

BETWEEN

1. MOHAMED SHERIA

2. JOSEPH SIALO MAKERO

3. GUNDA KANENO.....PETITIONERS/APPLICANTS

AND

1. SIMON KIPRONO SANG

2. DOCK WORKERS UNION (K)

3. SALIM BAMBAULO

4. MARTHA MWAKA

5. NANA MOTE

6. GLADYS CHEPKORIR.....RESPONDENTS

AND

REGISTRAR OF TRADE UNIONS.....INTERESTED PARTY

Rika J

Court Assistant: Benjamin Kombe

Wanjiku Mohamed Advocates for the Claimant

Mr. Ochieng' Advocate for the Respondents

Mr. Mwandenje Advocate for the Interested Party

RULING

1. The Petitioners filed an Application dated 29th June 2017. They seek to have the Court issue Conservatory Orders, restraining the Respondents from taking further actions with regard to removal and/or suspension of the Petitioners as the National Chairperson, National Treasurer and Assistant Chairperson respectively, of the 2nd Respondent.

2. The Respondents filed a Notice of Preliminary Objection on 7th July 2017.

(a) They hold that the Court lacks jurisdiction to interfere with the internal administration of the 2nd Respondent under Article 41(4) of the Constitution, and Section 8 of the Labour Relations Act 2007.

(b) They hold that the 2nd Respondent is regulated under its own Constitution. The Registrar of Trade Unions deals exclusively with matters of compliance with respect to the 2nd Respondent's Constitution, pursuant to Section 31 of the Labour Institutions Act 2007.

(c) The Petition is *res judicata*, as the same issues were dealt with under this Court's ***Cause Number 421 of 2017***.

(d) Change of Officers can only be made through an election and no such election has taken place.

(e) All Petitioners are registered Officers as per the records retained by the Interested Party.

3 (a) The Respondents reply that the Preliminary Objection is not properly before the Court, as it requires determination of some factual matters.

(b) Section 12(1) (g) of the Employment and Labour Relations Court Act confers upon this Court jurisdiction.

(c) Article 22 of the Constitution of Kenya grants persons the right to institute Court Proceedings, while Article 23(3) provides for various remedies.

(d) E&LRC Cause Number 421 of 2017 was rejected on the ground that the dispute between the Parties is not a trade dispute. The County Labour Officer had adopted the role of a Conciliator, and issued Certificate of non-resolution through misapprehension of the Law. The Cause did not deal with matters directly and substantially in issue in the Petition.

The Court Finds:-

4. The Petition is not *res judicata*. ***Cause Number 421 of 2017*** was filed by the Dock Workers, Union, against the Commissioner for Labour. 2 of the Petitioners, Mohamed Sheria and Joseph Makero, were named as Interested Parties by the Dock Workers' Union. The 3rd Petitioner Gunda Kaneno was not a Party in Cause Number 421 of 2017, and neither was the Registrar of Trade Unions. The Commissioner for Labour, is not a Party to the Petition.

5. The main issue in ***Cause Number 421 of 2017*** was that the County Labour Officer had intervened in the dispute between the Parties therein, and issued a Certificate of Non-Resolution of Dispute. He treated the dispute as a trade dispute. This is not the issue in dispute in the Petition.

6. The Court accepts the Respondent's position that the Petitioners have not been removed from Office; they have merely been suspended. They are still officials of the 2nd Respondent, and can only be removed through elections.

7. The Conservatory Orders are meant to protect the Petitioners from what they see as irregular suspension. Suspension bars them from exercising the roles entrusted to them through an electoral process. They are Officials as shown in the records of the Registrar of Trade Unions, but are powerless in discharge of their roles. These are orders worth being considered by the Court.

8. The Court does not agree with the Respondents that it is divested of jurisdiction in dealing with the Petition. The Court has the legal and constitutional mandate to demarcate rights and obligations of Parties.

9. The Petitioners cannot be inhibited through a Trade Union Constitution or Statute as advanced by the Respondents, in their search for constitutional protections and remedies.

10. The Preliminary Objection has no merit.

IT IS ORDERED:-

a) The Preliminary Objection is declined.

b) Parties shall fix the Application by the Petitioners for Conservatory Orders for hearing.

c) Costs in the cause.

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

James Rika

Judge