



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

PETITION NUMBER 8 OF 2016

KENYA UNIVERSITIES STAFF UNION.....CLAIMANT

VERSUS

FRANK ESEVWE.....1ST RESPONDENT

MAURICE OMER.....2ND RESPONDENT

OTIENO NYAMAU.....3RD RESPONDENT

ALFRED LIHANDA.....4TH RESPONDENT

NDAMBUKI MIZPAH MUTISO.....5TH RESPONDENT

KENNEDY TOSH ONDITI.....6TH RESPONDENT

RULING

1. The petitioner filed concurrently with the Petition, a Notice of Motion under certificate of urgency seeking in the main orders that:-

a. That this Honourable Court be pleased to grant interim injunctive order restraining the respondents herein, their agents, representatives or their members by whatever name called from inciting, commencing, participating or actualizing any disruption or interference with the petitioner's/applicant's elections scheduled for the 13th of February, 2016, pending hearing and determination of this application.

b. That Honourable Court be pleased to grant interim injunctive order restraining the respondents herein, their agents, representatives or their members by whatever name called from inciting, commencing, participating or actualizing any disruption or interference with the petitioner's/applicants elections scheduled for the 13th of February, 2016, pending hearing and determination of the instant petition.

2. The application was supported by the affidavit of Dr. Charles Mukhwaya who deponed among others as follows:-

a. That the petitioner/applicant the petitioner herein is a Trade Union duly registered and operating

as such within the Republic of Kenya with membership drawn from employees of Public and private Universities, University Colleges and their subsidiaries in Kenya.

b. That the Petitioner herein, Kenya Universities Staff Union (KUSU) was previously known as University of Nairobi Council and the Universities Non-Teaching Staff (UNTESU) prior to change of name.

c. That vide a Collective Bargaining Agreement signed between the petitioner/applicant and the University of Nairobi Council, the petitioner is the properly constituted body mandated to represent interests of its members who are in the employment of the University of Nairobi in grades 5-14 (grades A and above up to the Deputy Registrar) excluding those listed in schedule 1 of the appendix to the recognition agreement.

d. That the applicant has a leadership and membership structure underpinned in section 54, 55 of the Labour Relations Act, the constitution of Kenya Universities Staff Union as read together with the Recognition Agreement between University of Nairobi Council and the Petitioner herein (KUSU).

e. That as per the petitioner's constitution, for one to be a member and or the membership of the petitioner and be eligible for elections, he/she must fulfill the following:-

i. Apply for admission to the Union.

ii. Contribute the agreed monthly loyalty to the union as a group seeking recognition into Kenya University Staff Union.

iii. The number of contributors seeking recognition must constitute a simple majority in that group.

iv. Be University employees within 5-14.

v. On compliance with the above stated four attributes, the employer in this case the petitioner is enjoined to recognize the said group.

f. That in the alternative (6) above, the current/existing Recognition Agreement may be amended to include the interested group pursuant to section (4) of the current Recognition Agreement in force.

g. That the respondents have neither complied with the requirement in paragraph 6 above nor had the criteria in paragraph 7 above invoked in their favour and are thus strangers to the applicant.

h. That the respondents do not fit in the framework or parameters of Rule 6 of the applicants election rules 2016 and are by dint of the said rule barred from participating in the elections slated for the 13th of February, 2016.

i. That the applicant holds periodical elections and the next elections are to be held on 13th February, 2016 whereof the applicant has expended colossal resources to plan and arrange actualization of the same.

j. That the respondents herein have without any scintilla of justification threatened and or prepared to disrupt the said elections in blatant breach of attendant Recognition Agreement, section 54 & 55 of Labour Relations Act and Article 41 of the Constitution of Kenya, 2010.

k. That the threatened intrusion and disruption by the respondents is not based on any known objective or legal criteria and will thus serve to inconvenience the petitioner and its legitimate membership thus causing irreparable damage.

3. The respondents opposed the application and filed a Replying Affidavit through the 1st respondent who deponed in the main that:-

(a) That he is the 1st respondent herein and a member of the Kenya Universities Staff Union thus competent to swear this affidavit on his behalf and on behalf of the respondents.

(b) That he had read and understood the petition dated 28th January 2016 and he had the contents of the same explained by his advocates on record and in response thereto he wished to state as hereunder.

(c) That he was a fully paid up member of the petitioner applicant entitled to not only vote but also participate and contest in elections of the union as per the requirements of the union's constitution.

(d) That he had further paid a deposit of Kshs.5,000/= the requisite fee to contest in the said elections as required by the provisions of article 18.2.2(h) of the union's constitution.

(e) That he and the other Respondents do not intend to disrupt the meeting scheduled on 13th February as alleged but will be present and fully participate peacefully in the said meeting, vote and on his part he would be seeking members' mandate for the position of Branch Secretary.

(f) That the anticipated elections should not be disrupted by the petitioner's agents, who have sensed defeat and rejection by the fully paid up members of the University of Nairobi branch of the petitioner.

(g) That he was advised by his advocates on record advise which he verily believed to be true that under section 33 of the Labour Relations Act 2007 he was entitled to vote as a member since he was not in arrears of more than 13 weeks of monthly union subscription.

(h) That even if the Recognition Agreement was applicable his position as a driver was not excluded from union membership and participating in union activities which include his right to vote, contest and to be elected as an official of the union both at the branch and the national level.

4. In his submissions on behalf of the petitioner, Mr. Nyanyuki submitted that the respondents were not members of the petitioner eligible to vote and vie for elective positions in the petitioners leadership structure hence their intention to forcefully participate in the petitioners elections was in breach of the law. According to Counsel, by virtue of section 55 of the Labour Relations Act, there exists a recognition agreement between the petitioner and the University of Nairobi Council which provides for the cadre of employees represented by the petitioner. According to Mr. Nyanyuki, clause 2 of the Collective Bargaining Agreement provides that the petitioner represents interests of its members who are in the employment of the University of Nairobi in grades 5-14 excluding those listed in schedule 1 of the appendix to the recognition agreement.

5. According to Counsel, for one to be a member and eligible to participate in the elections he must be an employee of the University within grades 5-14 (grades A and above upto the Deputy Registrar), apply for admission to the Union and remit 1% of the basic salary to the Union monthly which are deductible by the employer and remitted to the Union. Counsel argued and urged the Court to find that the respondents have not complied with this set criteria.

6. Counsel for the respondent Mr. Nyabena on his part submitted that the respondents were fully paid up members of the petitioner as per the recognition agreement.

7. According to Counsel, the respondents were non-teaching staff of the University working as drivers. The Gazette notice no. 1787 was applicable to members of the University's non-teaching staff Union members where deductions were made from wages of employees who are members of the Union.

8. According to Mr. Nyabena, the allegations that for one to be eligible to make contributions, he or she must have the name listed in the check off form authorizing the deduction of 1% of the basic salary was misleading. Counsel further submitted that the petitioner has not brought any contrary document or evidence showing that the respondent are either among the teaching staff or belong to a rank which the petitioner does not represent. According to Counsel, the recognition agreement provides for non-teaching staff which the respondent squarely belong since they are drivers.

9. The recognition agreement attached as CM2 in Dr. Mukhwaya's affidavit provides that the agreement was entered into with the University on behalf of the predecessor Union (UNTESU) members covering the non-teaching staff in grade A and above up to the Deputy Registrar excluding those listed in schedule 1 of appendix 2 to the Recognition Agreement. UNTESU later became KUSU, the petitioner herein.

10. The Court has perused schedule 1 of the recognition agreement and does not seem to find any express exclusion of the respondents. This scenario coupled by the fact that the respondents have been making contribution on account of union dues to the petitioner, it would not be right to exclude them from the petitioners membership. Besides article 5(a) of the petitioners constitution provides that membership to the union shall be open to the non-teaching employees and other allied workers who are employed or engaged by the Universities or their subsidiaries. This provision of the petitioner's constitution is broad enough to cover the respondents.

11. The respondents have refuted the claim by the petitioner that they intend to disrupt the pending elections. They have instead indicated that they are peace loving and want to compete with the rest in these elections. Let the desire be granted. We are democratic society and belonging to a Union of their choice, is the respondents Constitutional right.

12. In conclusion the Court discharges the order made on 9th February, 2016 suspending the elections scheduled for 13th February, 2016 or any other date subsequently and hereby direct that the respondents be allowed to peacefully participate in the petitioners elections either as voters or candidates for any available seat subject to petitioner's constitution and election rules.

13. It is so ordered.

Dated at Nairobi this 24th day of March 2016

Abuodha Jorum Nelson

Judge

Delivered this 24th day of March 2016

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha Jorum Nelson

Judge