



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION 18 OF 2016

JULIUS MACHARIA MAINA 1ST PETITIONER

WILLIAM KIBIRI 2ND PETITIONER

VERSUS

KENYA BUILDING, CONSTRUCTION, TIMBER AND

FURNITURE INDUSTRIES EMPLOYEES UNION 1ST RESPONDENT

FRANCIS K MURAGE 2ND RESPONDENT

REGISTRAR OF TRADE UNIONS 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

RULING

1. The Petitioners have filed their application and Notice of Motion under the provisions of articles 27, 36, 41, 47 and 50 of the Constitution and sections 34 of the Labour Relations Act and seeking for orders that;

1. Spent
2. *That pending the hearing of the Petition the court be pleased to issue a conservatory order of injunction to restrain the 1st and 2nd Respondents from holding or proceedings with the election of National office bearers of the Kenya Building, Construction, Timber and Furniture Employees Union set to be conducted during the Quinquennial Delegates Conference scheduled to take place on 28th February 2016 at Sweet lake Resort.*
3. *That as an alternative to prayer 2 above pending hearing and determination of the application/Petition the court be pleased to issue an order of prohibition to prohibit the Registrar of Trade Union from effecting changes of natural [national] officials of the 1st Respondent occasioned by the election of National office bearers of the Kenya Building, Construction, Timber and Furniture Employees Union to be conducted during the Quinquennial Delegates Conference scheduled to take place on 28th February 2016 at Sweet lake Resort.*
4. *Costs of this application.*

2. The application is supported by the annexed **Affidavit Julius Macharia Maina** and on the grounds that the elections of National office bearers of the Union scheduled for 28th February 2016 if it proceeds there is high probability that the Petition will be rendered nugatory. The Union has until 30th

March 2016 to conduct its elections for National officer bearers in accordance with the directive by the 3rd Respondent issued on 25th November 2015 and there is justification that the Union will hold credible elections. Where election are held this will contravene article 36 and 41 of the Constitution read together with section 4 and 34 of the Labour Relations Act and Rules 13, 14 and 15 of the Union constitution.

3. Other grounds in support of the elections are that the election date of the National officer bearers was unilaterally fixed by the 2nd Respondent despite the provisions of the Union Constitution which gives such mandate to the Executive Council. Such Council was supposed to meet after the 3rd Respondent issued notice and following Branch elections conducted on 23rd and 24th February 2016 but the 2nd Respondent unilaterally fixed a date for National office bearers without authority from the Council. That the actions of the 2nd Respondent are actuated by ulterior motive to rig elections and he will be acceded by delegates who have been selected in accordance with the Union constitution. 5 branches, Embu, Nyahururu, Kisii, Malindi and Nanyuki are unlawful as they do not have Union members and the delegates from these Branches have no legal basis to participate or vote in the National elections.

4. In his supporting Affidavit, Mr Maina avers that he is the Branch Secretary of Southern Nairobi Branch of the 1st Respondent Union while the co-Petitioner is the Assistant National General Secretary.

5. Pursuant to notice of the 3rd Respondent dated 25th November 2015 to all unions to hold elections, the 2nd Respondent issued notice to Branch elections on 23rd and 24th February 2016. 23 Branches held elections as directed and were registered with the 3rd respondent.

6. Mr Maina also avers that by notice dated 1st February 2016 to all National officials and Branch secretaries the 1st Respondent was going to hold its Quinquennial Delegates Conferences during which National office bearers will be conducted on 28th February 2016. The 1st will be seeking to be elected as the National chairman while the co-Petitioner will be seeking to be elected for the position of Assistant National General Secretary.

7. The Executive Council met on 23rd December 2015 and agreed in accordance with Rule 4(b) of the Union constitution, the National elections would be held after change of office bearers at the Branches and he therefore expected that upon such Branch elections the Executive Council would meet to fix dates for National elections but before all braches could submit return the 2nd Respondent issue notice for National elections for 28th February 2016. Such notice is illegal as the mandate to fix National elections date is upon the Executive council. Such is to act fraudulently and with ulterior motive. The notice to Branches dated 7th February 2016 requiring that all Branches send 4 delegates to the National conference is in violation of Rule 7(a) (2). In this regard, officials from Embu, Nyahururu, Kisii, Malindi and Nanyuki were not validly elected and therefore not eligible to vote at the National elections. Such Branch elections should be nullified as such negate principles set out in article 36 and 41 of the constitution.

8. Mr Maina also avers that the 2nd Respondent is not qualified from contesting for the position of National General Secretary for the reasons that he is not sufficiently literate in both English and Kiswahili per Rule 12(d) (2) of the Union constitution; due to sickness he is not physically and mentally able undertake his duties as he has been in and out of hospitals locally and in India; and in October 2015 a major funds drive was conducted to aid him attend hospital in India. That the 2nd Respondent has confirmed he is ailing vide Affidavit filed in **HCC Misc. Civil Application No.879 of 2001**.

9. Maina also depones that the Minister published Legal Notice No. 20 on 1st February 2012 on Wage Orders in the Building and Construction industry but the 2nd Respondent went ahead and executed an agreement on minimum rates of wages with Mulji Devraj Brothers ltd contrary to the Legal Notice. The 2nd Respondent has also entered into a substandard collective agreement with China Road & Bridge Corporation, which actions are in breach and violation of Union member's rights. The Petition raises key public concerns that affect a wide section of Union members and in the public interest, the National elections should be stopped and the Petition heard on priority basis.

10. In reply, the 1st and 2nd Respondent filed the Replying Affidavit of Frank Murage on 29th February 2016 who deposes that he is the 2nd Respondent and the National General Secretary of the 1st respondent. In this regard, the 3rd Respondent issued notice directing all unions to conduct elections and the 1st Respondent issued notice to Branches to conduct elections. By an Executive Council meeting held on 23rd December 2015 elections were approved and a date set for National elections to be held on 28th February 2016 at a venue to be communicated from the secretariat. Upon the Branches conducting elections the 3rd Respondent is required to register such but there is no requirement to issue confirmation. The Executive Council pursuant to Rule 12(d) (2) of the Constitution has the mandate to fix National election date which was done on 23rd December 2015.

11. Mr Murage also avers that upon Branch elections such is registered with the 3rd Respondent and are then required to send delegates to the Annual Conference like all other Branches of the union. Rule 4(a) (ii) and Rule 6(a) require that 4 delegates nominated by each Branch attend and participate at the Quinquennial Delegates Conference. He executed his mandate in accordance with the Executive Council decision and as required by the Union Constitution at Rule 12. Such was not done to usurp any powers or to act unilaterally.

12. Upon the Branches holding elections, they were registered and there is no pending complaints. There is no evidence with regard to averments made concerning Embu, Nyahururu, Kisii, Malindi and Nanyuki Branches and no complaints are pending.

13. Mr Murage also avers that he is qualified under Rule 12(d) of the Union Constitution to carry out his role which he has done for several years. Such duties have been undertaken without challenges and whatever support structures exist for taking minutes and other roles are approved by the Executive Council and in accordance with the Union constitution. He had attended treatment in India but has since been carrying out his duties as required of a General Secretary without challenges. That in any event, the Petitioners have not indicated interest in contesting for the position of General Secretary which the 2nd Respondent has ably held for many years.

14. Mr Murage also avers that far from what the 1st Petitioner avers in his supporting affidavit, the Road and Civil Engineering Contractors Association of Kenya are not part of the CBA. He is qualified to run for office at the National elections. The averments that there are substandard CBA executed are not true and the questions raised with regard to literacy are without evidence and even in sickness such has not hindered the performance of duty and the office of General Secretary is not challenged by any contender. The offices that the Petitioners seek are distinct and separate from the General Secretary he is holding.

15. The petitioner's are keen to scuttle the National elections for no apparent cause as the reasons of sickness cannot form such basis. All actions done for the Union are valid and within the Union Constitution and laws of the land. The application by the Petitioners should be dismissed with costs.

16. The 3rd and 4th Respondents filed their Replying Affidavit sworn by Elizabeth Gicheha the 3rd Respondent officer who avers, as the Registrar of trade Unions notice was issued dated 25th November 2015 to all unions and employer associations and federations to conduct elections. In compliance, the 1st Respondent conducted Branch elections which have since been registered with Notice of Change of Officers in all Branches. The Petitioners have submitted applications for the position of National Chairman and Assistant General Secretary respectively and paid the requisite fee. Most of the issues raised in the application and Petition by the Petitioners are internal between the Petitioners and the 1st and 2nd Respondent save to note that the 2nd Respondent has been the Union General Secretary since 27th may 2001 and the issue of his qualifications has never been raised with the 3rd respondent. the Branches cited - Embu, Nyahururu, Kisii, Malindi and Nanyuki – are duly registered with the 3rd Respondent and were obligated to conduct elections as directed vide 2nd Respondent notice, though challenged to be illegal the Petitioner through that notice have expressed interest to vie for office. The Petitioners being

office holders in their Branches have not registered any complaints or objections with 3rd Respondent with regard to elections in Embu, Nyahururu, Kisii, Malindi and Nanyuki Branches.

17. Ms Gicheha also avers that the application by the Petitioners raises no issue and fails to disclose any cause of action to warrant the orders sought and non-relate to the 3rd and 4th respondents. Matters are still at the Union level and the 3rd Respondent will await and abide by the court ruling in the matter and abide by the outcome of the 1st Respondent National elections returns.

Determination

18. The biggest revolution in employment and labour relations in Kenya was introduced by the passing of new legislations with regard to the same in 2007. The shift that was built in unionisation is phenomenal. Such is found in the Labour Relations Act at the Preamble thus;

AN ACT of Parliament to consolidate the law relating to trade unions and trade disputes, to provide for the registration, regulation, management and democratisation of trade unions and employers organisations or federations, to promote sound labour relations through the protection and promotion of freedom of association, the encouragement of effective collective bargaining and promotion of orderly and expeditious dispute settlement, conducive to social justice and economic development and for connected purposes. [Emphasis added].

19. The Labour Relations Act therefore sets the conceptual framework for the registration, regulation, management and democratisation of trade union. In this case, the regulation with regard to the democratisation of the 1st Respondent comes to focus. The election of Branch and National offices are challenged. However, such are regulated vide circular issued by the 3rd Respondent office which all parties acknowledge was issued on 25th November 2015; such is regulated in law in accordance with section 4 and 34 of the Labour Relations Act; and more fundamentally are regulated by the Union constitution.

20. This court in the case of **Albert Chivini Mwiroti 7 others versus Registrar of Trade Unions & Others, Cause No.34 of 2016** held that;

... elections in their nature are supposed to be democratic and therefore a contest has to ensue. Where elections relate to leadership in trade unions, such is regulated by law and based on the existing Union constitution. The foundational basis for such elections is found under the Bill of Rights and the Constitution where the right to association is entrenched and further the right to join and participate in Union activities is engrained. Under the Labour Relations Act, section 4(2) thus provides;

(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.

21. The provisions of section 34 of the Labour Relations Act are also important to refer thus;

34. (1) the election of officials of a trade union, employers' organisation or federation shall be conducted in accordance with their registered constitutions

...

(5)The Registrar may issue directions to a trade union, employers' organisation or federation to ensure that elections are conducted in accordance with this section and their respective constitutions.

22. The notice/circular of the 3rd Respondent dated 25th November 2015 thus set in motion a process that was geared toward the democratisation of unions in accordance with mandate given in law and given constitutional force under article 36 and 41 of the Constitution of Kenya.

23. The Petitioners contest is that upon the holding of Branch elections on 23rd and 24th February 2015, there was supposed to be another Executive Council meeting to assess Branch elections and agree on the National elections. That the 2nd Respondent unilaterally fixed the National elections date which is unlawful and contrary to Rule 4 of the Union Constitution as such date should be agreed on by the Executive council.

24. Indeed, Rule 4(a) (b) of the Union Constitution provides that the supreme authority to convene the delegate conference shall be by a resolution of the central councillor Executive council. The Constitution further details at Rule 5 and 6 that the delegates to attend at the special delegate's conference and at the Quinquennial Delegates Conference are regulated at Rule 4(a) which directs that;

Four [4] delegates nominated by each Branch committee of the Union who shall be elected from among Branch full paid up members or registered officers of the Branch nominating them. Such delegates shall where possible include the Branch chairman, Secretary and treasurer, and their assistants.

25. As such, the Petitioners admit, which is also confirmed by the 2nd Respondent that on 23rd December 2015 the Executive Council met. Present at this meeting were the 2nd Respondent as National General Secretary, the 1st Petitioner as the committee member and the 2nd Petitioner as the Assistant National General Secretary. The agenda for the Executive Council comprised;

1. *Approval of 2016 election forms both for Branch and head office;*
2. *Setting date and venue of the Branch and head office elections; and*
3. *Any other business.*

26. On the agenda relating to *Setting date and venue of the Branch and head office elections* the Executive Council resolved;

... it was agreed that all Branch elections be held on 23rd January, 2016 and 24th January, 2016 and every Branch Secretary confirm the venue of the elections immediately and the election of Head Office be held on 28th February, 2016 at a venue to be decided by the secretariat.

27. Such was the resolution of the highest organ of the 1st respondent. I pause here to commend such practice. Where elections are planned towards democratisation, planning for the same in advance and without consideration of who the office bearer at the time of setting a schedule and time plan is a good practice. As at 25th November 2015 when the 3rd Respondent issued circular requiring all unions to conduct elections, such was an invitation to all unions to comply with provisions of the Labour Relations Act and indeed for each Union membership to exercise their constitutional right to associate and participate in the affairs of their Union as guaranteed under article 36 and 41 of the constitution. Such therefore gave each party an opportunity to ensure that they democratically participate in an election that was free and fair and that each member had a reasonable and fair chance to participate. Therefore at the Executive Council meeting held on 23rd December 2015 by setting the time-plan for such election was to put into motion an open and fair schedule that any member could be able to make reference to and attend at the Branch level and seek office and without pre-empting any outcome of the Branch elections, had period knowledge that the National elections would be held on 28th February 2016. Such I find, gave each member a fair chance and prior information and knowledge of each step. The Executive Council having

thus passed a resolution on 23rd December 2015, such resolution could only be acted upon by its officers and the 3rd Respondent being the officer mandated to issue communication with regard to decisions of the 1st respondent, being the General Secretary of the 1st Respondent and the officer recognised under section 2 (a) of the Labour Relations Act as the official representative of the 1st Respondent union, he had the mandate to communicate and issue notice and indicting venue for the National elections. Such cannot be illegal and or unlawful under the Union Constitution or under the Labour Relations Act. The 2nd Respondent was carrying out his mandate.

28. By the 2nd Respondent calling for National elections on 28th February 2016, I find the 2nd Respondent did not contravene article 36 and 41 of the Constitution or any part of the Union constitution. The notice issued for National elections was in compliance with section 4 and 34 of the Labour Relations Act. This was in accordance with a resolution of the 1st Respondent Executive Council meeting held on 23rd December 2015. Such cannot be faulted as being unlawful.

29. The Petitioners also contest that the 2nd Respondent has called for National elections with an ulterior motive set to rig the same. That 5 branches, Embu, Nyahururu, Kisii, Malindi and Nanyuki did not hold lawful elections and should not participate at the National election of the union. What is apparent is that the 2nd Respondent has been the Union General Secretary since 2001. The Union Executive Council met on 23rd December 2015 and resolved on the conduct of Branch and National elections. The Petitioners were part and parcel of the Executive Council meeting in their capacity as Committee member and Assistant National General Secretary respectively. Since, the Petitioners have participated in their Branch elections in Nairobi and Kiambu respectively. Such Branch elections were held on 23rd and 24th February 2016 and returns have since been filed with the 3rd respondent. There exists the Labour Relations Act that regulate the registration of new officials and where there exists objections with regard to any returns, such are to be lodged with the 3rd Respondent before reference to court. The law is set out in a manner that each party seeking to challenge and object to the election of any Union official(s) is given a fair chance at the earlier moment and with the 3rd Respondent who in liaison with the Minister has officers presiding over the elections to establish matters of fact and where a party is not satisfied then lodge a suit before this court. As such, I take it all the 1st Respondent Union Branches have since conducted their elections inclusive of the Branches where the Petitioners are members of and as a result, the Petitioners have expressed interest to vie for National chairman and assistant National General Secretary Positions following successful Branch elections. As such, I find no merit that the cited 5 Branches which have filed their returns with the 3rd respondent, held unlawful elections and should be barred from participating in the National elections. To seek such orders against Branches that successfully conducted their elections and such have since been registered with the 3rd Respondent and there exists no objections would be to curtail the members of Embu, Nyahururu, Kisii, Malindi and Nanyuki Branches rights under article 36 and 41 of the constitution. Such would be the injustice. Such would be contrary to true democratisation of trade unions in Kenya.

30. In the Affidavit of Julius Macharia Maina, he has averred that Mr Murage is disqualified from contesting for the position of National General Secretary for reasons of illiteracy; sickness; and for allowing substandard CBA with various employer organisations. Such I find to be very serious allegations that should not be casually treated noting in the main, there are no orders sought for the disqualification of Mr Murage from vying for office. I make specific mention of such matters noting the confirmation by the 3rd Respondent that Mr Murage has been the 1st Respondent National General Secretary since 27th May 2001. Indeed the cited case in HCC Misc. No.879 of 2001 is as old as the 2nd Respondent holding office with the 1st respondent. The averments cited in his Affidavit then, and where he stated under oath in 2001 that he was ailing, this is 2016 and Mr Murage has continued to serve as the 1st Respondent National General Secretary to date.

31. I take it that the position of National General Secretary of the 1st Respondent is elective. Such elections are conducted by delegates, 4 from each Branch and have deemed it fit to have Mr Murage as

their National General Secretary since 2001 to date. I cannot fault what the members of the 1st Respondent have done as with their choice of Mr Murage as their National General Secretary, this is evidence that he is serving their interests well.

32. Mr Maina in his supporting Affidavit at paragraphs 21 and 23 depones that;

... as required under Rule 12(d) (5) he [Mr Murage] is not able to devote all his time to the services of the Union because of sickness, which sickness has not only physically incapacitated him but also mentally affected him to the extent that he suffers serious mental lapses, he has been in and out of hospital both locally and in India. ...

23. The second Respondent is aware that physical and mental fitness are critical for the promotion and advancement of the Union's missions and activities. ...

33. I make the above analysis for the reason that there exists article 27 of the Constitution and at 27(4) provides;

[there shall be no discrimination against any person] ... directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. [Emphasis added].

34. Such provisions are to be respected, promoted and supported by the state, private persons, entities such as the 1st Respondent at the National level and at Branches. These constitutional provisions are given further support by the ILO Constitution, in its Preamble, it seek to ensure the protection of all employees from sickness, disease and injury arising out of employment, and by extension and with regard to this case, while in the course of serving in a trade union or employer association an official becomes sick, such an employee is to be given protection and not alienation. Despite any sickness or ill-health, the work done by such an employee or official is of great value and should not be used to compromise the right to association and participation in unionisation or trade union activities. Such restriction, barring or in any manner of restraint would be contrary to ILO conventions and article 36 and 41 of the Constitution of Kenya. It would thus reduce the sanctity of democratisation of trade unions protected under the Labour Relations Act and well addressed under the 1st respondent Constitution.

35. United Nations Convention on the Rights of Persons with Disability (CRPD) at article 12. Even where a person seeking officer suffers a mental challenge, such a person should not automatically be disenfranchised as correctly held by the **European Court of Human Rights, Alajos Kiss versus Hungary, Application No. 38832/06, 20 May 2010**. This is in recognition that despite sickness, every person has a right to participate in the affairs of society such as unionisation and the democratisation process within trade unions. Even where one has sickness, the CRPD calls for supported processes unlike discarding such a person into oblivion for the simple reason of sickness or disability. In this case, I find Mr Murage has been able to execute his mandate without challenge and where reasons call, the Executive Council have put measure in place to support his work which should apply to all the other officers found sick and on a needs basis require similar support.

36. As such, where the 2nd Respondent is sick or has attended hospital, such are not matters sufficient for the Petitioners to advance and urge the court to apply and direct that he be disqualified from running for office. To direct as such would be an illegality and an act prohibited under the Constitution for being discriminatory and would go contrary to fair labour relations and practices and would set a bad precedent in the democratisation of trade unions in Kenya. Being sick, unwell or being incapacity as the 2nd Respondent is said to be requires support as stipulated under article 12 of the CRPD which resonates true in this case. Had Mr Murage not been undertaking his duties effectively since 2001, the various elections of the 1st Respondent since should have addressed that. Where 1st Respondent members find him fit to serve, this court cannot and does not have the mandate to fault the 1st Respondent member's choice.

37. Reference was made to the provisions of Rule 12(d) of the Union Constitution on the grounds that

the 2nd Respondent is illiterate and should be disqualified from running for office. My reading of Rule 12 in its entirety and particularly at Rule 12(d) (2) the office of National General Secretary requires one to be *sufficiently literate* in both English and Swahili languages. The *sufficiently literate* requirement is not defined under this Constitution and to apply the same upon Mr Murage in the manner set out I find to be very subjective and open to various interpretation one of which cannot be that he has held the office of National General Secretary for over a decade and a half without being adequately literate to run the affairs of the 1st respondent. I hasten to add that, Rule 12(d) has several other requirements that a National General Secretary of the Union must meet. Such have not been gone into by the Petitioner and found that Mr Murage is wanting.

38. Without any order in the main addressing the disqualification of the 2nd Respondent from running for any office, the above analysis and assessment shall suffice. Since the Petition remains alive, I will state that much.

39. The orders sought by the Petitioners in the interim must therefore fail. I find no sufficient grounds or reasons to issue conservatory orders stopping the election of National office bearers of the 1st Respondent or why the 3rd Respondent should be restrained from receiving and effecting changes of National officials of the 1st Respondent occasioned by such an election. I find no prejudice occasioned to the Petitioners by the holding of election of National office bearers and further no prejudice shall be occasioned by the submission of such returns to the 3rd Respondent. In any case the Petitioners have submitted themselves for position at the elections and shall therefore have a fair chance just like any other member who has indicated their intention/interest to vie. Such can only be achieved by the 1st Respondent conducting its elections for national office bearers within the timeline directed by the 3rd Respondent.

40. The elections scheduled for 28th February 2016 have since been stopped, the Respondents were cooperative and adhered to the orders of the court, it is apparent that great expense had been gone into in the organisation of such elections and without putting the Petitioners at any disadvantage in that regard, and noting that they have given intention to vie for various offices with the 1st Respondent, all parties being aware of the proceedings herein, the 1st Respondent shall issue notice of venue as directed by the Executive Council on 23rd December 2015 and be able to hold elections for National office bearers before the due date of 30th March 2016.

In conclusion therefore,

- a. **application dated 25th February 2016 is hereby dismissed;**
- b. **In due recognition of the Executive Council meeting of the 1st Respondent held on 23rd December 2015 and noting the proceedings herein and the interim orders granted to the Petitioners, the 1st Respondent shall hereby proceed and hold elections for National office bearers on or before 30th March 2016;**
- c. **The 2nd Respondent shall proceed and issue notice of venue for the election for national office bearers; and**
- d. **Costs to the Respondents.**

Orders accordingly.

DELIVERED IN OPEN COURT AT NAIROBI THIS 18TH DAY OF MARCH 2016.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Lilian Njenga

.....

.....