REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 894 OF 2016

DR. JACINTA KIMUYU.....1ST CLAIMANT/APPLICANT

DR. MUMAH SOLOMON.....2ND CLAIMANT/APPLICANT

PETER CHERUTICH.....3RD CLAIMANT/APPLICANT

RICHARD ONCHANGA.....4TH CLAIMANT/APPLICANT

FRANCIS O. OCHIENG.....5TH CLAIMANT/APPLICANT

VERSUS

THE UNIVERSITY ACADEMIC STAFF UNION (UASU)……1ST RESPONDENT

REGISTRAR OF TRADE UNIONS…….....……2ND RESPONDENT

RULING

1. The application before me is the Claimants/Applicant's Notice of Motion application dated 18th May 2016. The Claimants seek through the motion expressed to be brought under Section 12 of the Employment and Labour Relations Act, Section 4(2) & 34(1) of the Labour Relations Act and Article 41(2)(c) of the Constitution of Kenya, for interim injunction against the Respondent's officers, Technical University of Kenya Chapter officials or their agents from holding elections on 19th May 2016 as scheduled as well as declare the election by notice by the 1st Respondent on 19th May 2016 as null and void and order for fresh election notice as required by law. The motion was supported by grounds on the face of it as well as a supporting affidavit sworn by the 1st Claimant/Applicant.

2. The Court on hearing the application *ex-parte* at first instance issued conservatory orders and upon service of the motion upon the 1st Respondent, it emerged that there was a pre-existing cause being Industrial Cause No. 309 of 2016 involving the 1st Respondent and one Ludith Nelima Wasike.

3. The 1st Respondent replied to the motion by way of a Replying affidavit filed on 30th May 2016 and in the replying affidavit sworn by Jacob Musembi Ndungi the Secretary General of the 1st Respondent's Technical University Chapter and the National Deputy Secretary General of the 1st Respondent, it was deponed that the Claimants did participate willingly in the elections called by the 1st Respondent. He deponed that the Claimants herein were aware but did not enjoin themselves in Cause 309 of 2016 but

nominated candidates or themselves for positions in the elections.

4. At the hearing of the motion, Mr. Musyoki for the 1st Respondent indicated that he would raise a preliminary objection to the motion on the basis that the Claimants had not complied with Court order granted by the Court on 20th May 2016. He submitted that the Court granted the Claimants the opportunity to amend the notice of motion and gave time lines on the same. He submitted that the Court order was very clear that the amended motion be filed and served on 23rd May 2016. He submitted that by filing the amended motion on 24th May 2016 without leave, the Claimants were estopped from doing so. He submitted that nothing prevented them from coming to Court prior to that day or on the 23rd May 2016 to seek extension of time. He submitted that there was not even an averment that there was difficulty in filing the amended application. He submitted that there being no leave sought the application should be struck out and that the Claimants had a remedy in that they could file a fresh motion if minded. He submitted that the Claimants had enjoyed the discretion of the Court and should have been the first to comply.

5. In reply, Mr. Oduor for the Claimants submitted that he filed the amendment and relied on Article 159 of the Constitution and stated that a litigant should not be denied a hearing because of a technicality. He submitted that a litigant should come to Court with clean hands and that he had indicated why the application was filed late. He stated that there were demonstrations on Monday 23rd May 2016 and therefore the filing on 24th May 2016. He submitted that he had sought to have the motion deemed as duly filed and that there would be no prejudice suffered by the 1st Respondent if there is hearing on merits. He urged the Court to dismiss the preliminary objection with costs.

6. In a brief reply, Mr. Musyoki for the 1st Respondent submitted that a Court order giving time lines cannot be called a technicality. He submitted that the so called demos are not demonstrated and that it had not been shown how the demos had stopped the Claimants from filing.

7. The 1st Respondent raises what he says is a preliminary objection. The ingredients of a proper preliminary objection was stated in the celebrated case of **Mukisa Biscuit v West End Distributors Ltd [1969] E.A. 696** the *locus classicus* on preliminary objection. In the case Law J.A. stated a preliminary objection to be thus:-

> *"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."*
>
> Sir Charles Newbold, President stated thus in the same judgment:-
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> *"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."*

8. In the matter before me, there is no discretion being sought nor am I being asked to ascertain facts. The Court is invited to hold that the documents filed by the Claimants were improperly before the Court due to the time limits set by the Court in the order of 20th May 2016. Mr. Musyoki for the 1st Respondent submits that there is no explanation given and no leave sought prior to the filing out of time. He submits that filing contrary to the Court order cannot be called a technicality. Mr. Oduor for the Claimants submits that the explanation is the demos on Monday 23rd May 2016 and that leave was sought informally before the Court during the session prior to the preliminary objection being raised. He opined that the Court should not apply the technicality to deny a party a hearing.

9. The Court record bears out that Mr. Oduor did request that the application filed on 24th May 2016 be deemed to have been duly filed. His reason for the delay was the demos on 23rd May 2016.

10. In the Court's view, the order granted on 20th May 2016 was gratuitous. In granting it, the Court was minded to preserve the *status quo* pending hearing of the Claimants motion. The order was explicit. Article 159(1) and (2) of the Constitution provides as follows:-

> *(1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.*
>
> *(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—*
>
> > *(a) justice shall be done to all, irrespective of status;*
> >
> > *(b) justice shall not be delayed;*
> >
> > *(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);*
> >
> > *(d) justice shall be administered without undue regard to procedural technicalities; and*
> >
> > *(e) the purpose and principles of this Constitution shall be protected and promoted. (underline mine)*

11. The Constitution is very clear in Article 159(2)(d). Justice shall be administered without undue regard to technicalities. It is clear that technicalities may be considered and only undue technicalities may not be regarded. In my order of 20th May 2016, I was clear on the time lines. Is a Court order a technicality? I think not. Whereas Mr. Oduor raises the phenomenon of tear gas Monday as cause for the delay in filing, he does not demonstrate how the demonstrations on Monday 23rd May 2016 hindered his filing. He did not state that he was impeded by the marauding mobs or the tear gas, he did not state that he was otherwise unable to access the Court in order to file. Court sessions and services were provided without any handicap on Monday 23rd May 2016 as will be attested by the cause lists and the myriad cases heard before the Courts in Nairobi. In my view, failure to comply with a Court order is tantamount to wilful disobedience of a lawful order and is punishable as contempt. The only plausible outcome of the foregoing reasoning is the striking out of the motion with costs to the 1st Respondent. It is so ordered.

Orders accordingly.

Dated and delivered at Nairobi this 7th day of June 2016

Nzioki wa Makau

JUDGE