



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU
PETITION NO. 14 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

HARRISON OMWENGA MARIGA CLAIMANT

-Versus-

1. KENYA NATIONAL ELECTION BOARD OF KENYA

NATIONAL UNION OF NURSES

2. SETH PANYAKO RESPONDENTS

J U D G E M E N T

The Petitioner Harrison Omwenga Mariga filed the Petition herein seeking the following reliefs:-

- a) A declaration that the election to be held be declared null and void.
- b) A declaration that the Petitioner is the organizing secretary.
- c) Costs to be awarded to the Petitioner.
- d) Any other relief this court may deem fit to grant.

Together with the Petition the petitioner filed a motion under certificate of urgency seeking the suspension of a notice for election dated 4th April, 2016 pending the determination of the petition and a declaration of the notice null and void. The motion was supported by the grounds on the face thereof and the Petitioner's affidavit sworn on 3rd May 2016.

On 24th May, 2016 when the Petition came up for hearing of the motion I directed that the Application and the Petition be heard together.

The petition was heard on 12th July, 2016. The Petitioner testified in support of his petition while Mr. Seth Panyako the 2nd Respondent who appeared for himself and on behalf of the 1st Respondent opted to rely on his written submissions which he highlighted on the hearing date.

Petitioner's Case

The Petitioner relied on the petition, which was filed with a list of documents but was not supported by a statement of facts or supporting affidavit. No mention is made of any provision of the constitution that

has been infringed or the manner in which such provision has been infringed or threatened. The court relied on the affidavit in support of the motion which only states the facts that the petitioner relies on. Petitioner also filed skeleton submissions.

At the hearing the Petitioner was represented by Mr. Nyagwencha instructed by Maroro & Omariba Associates Advocates.

The Petitioner's case is that he is a founding member and official of the Kenya National Union of Nurses Kisii Branch as the organising secretary. The Branch was registered on 5th February, 2014 and the inaugural elections held on 18th March, 2016.

According to the Petitioner the inaugural elections were held in violation of chapter XIX(5) of the Constitution of Kenya National Union of Nurses which provides that "***The founding officials of the Union shall not be subjected to an inaugural election.***" The Petitioner's position is that since he is an inaugural founding official and was interested in continuing to serve as the Branch Organising Secretary the elections for that position were null and void.

The Petitioner's further proposition is that even if the elections were to be considered valid he should be considered to have been elected unopposed as his only opponent Isabella Nyagwoka was not eligible to vie for the elections under chapter III of the Union Constitution.

The Petitioner submitted that in a letter dated 30th March, 2016 the General Secretary of the Union (the 2nd Respondent) retained him in his position and no protest has been raised by the members since he was declared elected unopposed.

The Petitioner took issue with the 2nd Respondent's letter dated 14th April, 2016 which called for repeat elections for the position of Kisii Branch Organising Secretary, the post in which the petitioner had been declared unopposed. The Petitioner prayed that this court finds and declares that being a founding official the Petitioner should not be subjected to the inaugural election. He prayed that the court declares that he should retain his seat. He also prayed for costs.

Under cross examination the petitioner stated that he garnered 96 votes against 180 votes garnered by his opponent Isabella Nyagwoka. He stated that there are 900 members in Kisii Branch but elections were not held in all stations.

Respondents Submissions

Mr. Seth Panyako, the 2nd Respondent appeared for the 1st Respondent and on his own behalf. He relied on the 1st Respondent's grounds of opposition dated 29th June 2016, his replying affidavit sworn on 29th June, 2016 and the 1st Respondent's skeleton submissions dated 12th July, 2016. Mr. Panyako highlighted the submissions on 12th July, 2016.

The 1st and 2nd Respondent's case is that:-

- a) The 1st Respondent conducted elections in various branches including Kisii Branch pursuant to the notice of elections issued on 5th January, 2016.
- b) After the outcome of the election in Kisii, the Petitioner informed the 1st Respondent that Isabellah Nyankwoko who was elected as the Branch Organizing Secretary was not qualified to contest as she had not been a member of the 1st Respondent for the period of time required for a person to contest for elections.
- c) On verifying that this information from the petitioner was true, the 1st Respondent in consultation with the National Executive Council of the Union nullified the elections in respect of Branch Organising Secretary and temporarily reinstated the petitioner.

d) That in order to remedy the anomaly which had been occasioned by an unqualified person being elected Branch Organising Secretary, the 1st Respondent issued a fresh notice of elections dated 14th April 2016 in respect of Kisii Branch Organizing Secretary.

e) The fresh election notice did not favour any one person and neither did it discriminate against any one aspiring to lead in the position of Branch Organizing Secretary, including the Petitioner.

f) It is therefore the 1st Respondent's case that the fresh notice of elections for Branch Organizing Secretary, which the Petitioner seeks to stop and to be declared Branch Organizing Secretary, is justifiable under the law and the court should allow the repeat elections to proceed.

g) It is also the 1st Respondent's case that the Petitioner's petition is bad in law as whereas it seeks for unconstitutional orders, it should not have been filed in the first place as there is no cause of action meriting the court intervention by way of a petition.

It was submitted for the Respondents that the law governing the current case is set out in the Constitution, the Labour Relations Act, the Industrial Court Procedure Rules and the 1st Respondent's Constitution and other relevant case laws.

The Respondents submitted that the Constitution of Kenya 2010 provides for various fundamental rights and freedoms under chapter four (Bill of Rights) and for labour rights at Article 41 (1) (c).

It is the submission of the Respondents that those rights shall be violated if the repeat elections for Branch Organizing Secretary are not conducted in Kisii so that members who are qualified can apply to be elected and the members allowed to participate in the elections of the Branch Organizing Secretary.

The Respondents further referred to Article 27(1) (2) (4) (5) which provides as follows;

27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(4) The state shall not discriminate 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.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

It is the Respondent's position that if the orders the Petitioner seeks were to be granted, the fundamental rights of members in Kisii would be violated as those who wish to contest for the elections shall have been discriminated.

The Respondents submitted that any action taken earlier and which did not conform with the Constitution, including reinstatement of the petitioner to his earlier position without giving members a chance to elect him or someone else, was null and void **ab initio**.

The Respondents submitted that the Labour Relations Act, No.14 of 2007 was enacted for the purpose of consolidating the law relating to trade unions and trade disputes, registration, regulation, management and democratization of trade unions and employers organizations or federations, promotion of 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 related purposes.

It was their submission that Section 4(2)(a)(b)(c)(d) provides for labour rights as in the following terms;

4 (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.

It is further the submission of the Respondents that the foregoing would be violated if the court grants the orders sought by the Petitioner as the members of Kenya National Union of Nurses in Kisii would have been denied their rights as provided for by law.

The Respondents submitted that section 34 of the Labour Relations Act further provides that;

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

(2) The constitution of a trade union, employers' organisation or federation shall-

(a) not contain a provision that discriminates unfairly between incumbents and other candidates in elections; and

(b) provide for the election, by secret ballot, of all officials of a trade union at least once every five years;

(4) Disputes arising from, or connected directly or indirectly to, elections held under this section may be referred to the Industrial Court.

Based on the foregoing provisions, it is the Respondents' position that the Petitioner's prayer to be declared the duly elected Branch Organizing Secretary without fresh elections involving other interested candidates would be unlawful as it will amount to discrimination against the other candidates who may wish to vie.

The Respondents submitted that the provisions of section 34(4) further specify the avenue for seeking redress in the event of dissatisfaction with the manner elections are held.

It is the submission of the Respondents that nothing happened that warrants the petitioner to refer the matter in this court vide a petition rather than a claim. The Respondents submitted that the Petitioner has not set out any right in the petition which has been violated or threatened with violation worthy of the courts intervention by way of a petition.

The Petitioners further submitted that Chapter XIX (1)(2)(3)(4)(5) of the Union Constitution provides for notice of elections as follows;

(1) The taking of all decisions in respect of the national officers, the amendment of Chapters, strikes, dissolution and any other matters affecting members of the union generally shall be by secret ballot

(2) No member of the union shall be eligible to vote any matter if his/her monthly subscription is more than six months in arrears

(3) National, branch and institutional election shall be conducted directly by secret ballot

(4) The review of the Constitution shall be through a referendum, where all members shall directly vote and after proper member participation in the review process has been done.

(5) The founding officials of the union shall not be subjected to an inaugural election.

It is the Respondents submission that the notice of election issued conforms to the union constitution and nothing in the constitution provides for declaration of a person as duly elected without members voting by members.

It is further the submission of the Respondents that any declaration of the Petitioner as a duly elected Branch Organizing Secretary without actual voting by secret ballot would contravene the constitution of the union and to an extension to the Labour Relations Act.

The Respondents relied on this court's decision in **Cause No. 1650 of 2011 – Aloise A. Otiende V Bonface Munyao Kenya Local Government Workers Union**. The Court found, held and ordered as follows;

.... where a stranger has participated as a candidate, in an important position such as the General Secretary of trade union, the elections cannot be said to have been conducted substantively in accordance with the law as to election. The issue of Munyao's lack of nomination cannot be said to be trivial, or not to have any bearing on the outcome. He was not a legitimate candidate and his participation in the election, and winning of majority votes cast, closed out the other candidates who may have been legitimately nominated, from emerging as the probable winners.

Based on the above findings, the Judge gave an award in the following terms;

The court is satisfied that the claimant has established his claim on the invalidity of Mr. Munyao's participation as a candidate, in the election of KLGWU of 18th June, 2011. Consequently, the COURT DECLARES and IT IS HEREBY ORDERED;

(a)

(b) The Registration of the 1st Respondent as the National General Secretary is a Nullity, and the said registration is cancelled forthwith;

(c) The 2nd Respondent shall 1 carry out a repeat of the nomination and election for the position of the National General Secretary in accordance with Union Constitution, within a period of 60 days from the date of the delivery of this Award, and

(d)

It is the submission of the Respondents that the Court finds similarity in this case.

The Respondents further submitted that the Industrial Court (Procedure) Rules, 2010 at Rule 4(a)(b)(c)(d) provides for the manner in which claims should be lodged in court. Specifically, the rules provide that a party who wishes to refer a dispute to court under any written law shall file a statement of claim setting out-

(a) the name, the physical and the mailing address and full particulars of the Claimant

(b) the name, the physical and mailing address and the description of the respondent.

(c) the name, the physical and mailing address of any other party involved in the dispute.

(d) The facts and grounds for the claim specifying issues which are alleged to have been violated, infringed, breached or not observed and in the case of a trade dispute the rights of the employees not granted or to be granted, any other employment benefits sought and the terms of collective bargaining agreement on which the jurisdiction of the court is being invoked;

(e) any principle or policy, convention, law or industrial relations issue or management practice to be relied upon; and

(d) the relief sought

The Respondents submitted that the Petition offends the mandatory provisions of the rules and that failing to describe parties and to explain why the parties are sued renders the petition fatally defective for party misjoinder; that the 2nd Respondent has been dragged to court in his individual capacity for the perceived actions of the Kenya National Union of Nurses. That the remedy for the alleged violations if successful would lie with the union rather than the 1st and 2nd Respondents. Further, the 1st Respondent as indicated is an ad hoc board enlisted only for the purpose of the elections and is incapable of suing or being sued as it is not a body corporate.

It is the humble submission of the 1st Respondent that the Petitioner has sued the wrong parties and that any orders in favour of the petitioner would be orders in vain as the respondents are incapable of being sued for matters concerning the Kenya National Union of Nurses. They would not be able to implement the orders in suit.

The Respondents submitted that the petitioner has failed to establish a case against the Respondents.

Determination

Parties are in agreement that the Petitioner was one of the founding officials of Kisii Branch of the Union. Parties are also in agreement that Branch elections were held on 18th March, 2016 and one Isabellah Nyagwoka was elected as the Branch organising secretary, the position held by the Petitioner prior to the elections by 180 votes against the Petitioner's 96 votes. The election of Isabellah Nyagwoka was subsequently nullified after the discovery that she was ineligible to vie for the position and the petitioner was reinstated as branch organising secretary.

The point of departure is the 2nd Respondents letter dated 14th April, 2016 calling for repeat elections for the position of the branch organising secretary. This stems from the different interpretations by the Petitioner and the Respondent of Chapter XIX(5) of the Union's Constitution which provides that:-

"(5) The Founding Officials of the Union shall not be subjected to an inaugural election."

The interpretation of the said provision therefore is the main issue in dispute in this petition. Other preliminary issues are whether the Respondents had capacity to be sued, and whether there was a misjoinder of parties, and whether the petition discloses any violation of rights of the petitioner warranting protection of this court.

The Constitution

Article 22 of the Constitution gives every person a right to institute court proceedings to protect a right or fundamental freedom in the Bill of Rights that has been denied, violated or infringed, or is threatened.

In the case of ANARITA KARIMI NJERU the court set the Principle that a person who comes to court to enforce the specific rights set out under the Bill of Rights must set out with some level of particularity the

specific right and how it is violated. The principle was reaffirmed by the Court of Appeal in the case of **Mumo Matemu v** when the Court stated that:-

"We cannot but emphasize the importance of precise claims in the due process, substantive justice, and the exercise of jurisdiction by a court. In essence due process, substantive justice and exercise of jurisdiction are a function of precise legal and factual claims."

In the instant case there is no mention of any article of the constitution. There is no reference to the constitution at all. The only constitution referred to is the constitution of the Kenya National Union of Nurses. On that basis alone I ought to strike out this petition.

The Labour Relations Act

The Labour Relations Act (the Act) sets out the manner in which union elections at both the national and branch levels should be conducted at section 33 and 34. The First Schedule to the Act also provides that unions must provide for, among them the following:-

4. The appointment or election and removal of an executive, and of trustees, secretaries, treasurers and other officers of the trade union or employers organisation;

8. The taking of all decisions in respect of the election of officials, the amendment of the constitution, strikes, lock-outs, dissolution and any other matters affecting members of the trade union or employers organisation;

9. The right of any member to reasonable opportunity to vote;

10. The amount of subscription and fees payable by members, and the discrimination of a member from voting on any matter concerning the union and from receiving benefits if the members' subscription is in arrears.

It is in compliance with the Act that the union's constitution provides for founding officials not to be subjected to an inaugural election whose interpretation is contested.

The petitioner interprets the provision to mean that because he was a founding official he should not be subjected to elections. The petitioner states that this is because he has not completed his term of five years.

The Respondents argue that this interpretation would be against the provisions of Article 27 which guarantees equal protection against discrimination. The Respondents further state that it would be against Article 41 which provides for the right of every employee to form, join and participate in the activities and programs of a trade union. The Respondents submit that granting the Petitioner the prayers he seeks would be unconstitutional as it would give him unfair advantage as against other contestants who would be denied an opportunity to participate in the elections for the position of Branch Organising Secretary or choosing a candidate of their choice.

In order to interpret chapter XIX(5) of the Union's Constitution one has to first understand how union elections are managed.

The Registrar of Trade Unions under powers granted by section 31 of the Labour Institutions Act to regulate trade unions directs when elections are to be held by sending a circular to all secretary generals of registered trade unions. The circular gives time frames for holding of elections. The process of the elections is governed by the individual union's constitution. This therefore means that Unions, and the Respondents specifically, do not have control of when elections are held as this is the preserve of the Registrar, and elections are traditionally held every 5 years.

This means that interpreting the clause in the manner suggested by the Petitioner would mean that he

would hold office until the next elections are called after another five years. This would infringe on the union's constitution which provides that elections must be held every 5 years and that should the office of an official become vacant for reasons of death or resignation the deputy shall take office until the end of the remaining term.

It is further the opinion of the court that the petitioner was all along aware of and in agreement with this position and that this is why he agreed to take part in elections of 16th March, 2016. It is only after losing the elections that he complained about being subjected to elections yet he is a founding member.. He did not complain when a decision was made that elections for all the branch positions including the Branch Organising Secretary were to be held. He presented his papers and went ahead to participate in the elections in which he lost with 96 ballots against his opponent who garnered 180 votes. It is only after the opponent was declared ineligible and fresh elections called that he raised the issue of inaugural officials not being subjected to elections.

The correct interpretation of Chapter XIX(5) is that when a union or a branch of a union is set up, the first set of officials shall not be subjected to elections. It means they take up the offices without being elected. The petitioner acknowledged this position when he stated as follows during cross examination :-

"When I came to the office the position I wanted originally was acting branch secretary. As an active and aggressive unionist, I realised that I should take any post so that the branch can be started. I ended up in the position of organising branch secretary."

Whether the Petitioner should be declared winner following the disqualification of his opponent

The Petitioner argued that his opponent having been found ineligible to vie for the position of branch organising secretary and the 2nd Respondent having written a letter dated 30th March, 2016, he should not be subjected to fresh elections. The union however later decided to hold fresh elections.

Although the Respondents failed to explain why they declared the petitioner elected unopposed and later decided to declare the elections cancelled, the position taken by the Respondents was the proper position. Elections which are held where one of the candidates is ineligible is not the same as an election in which there is only one contender and therefore the contender is unopposed. As was held in the case of **Aloise A. Otiende v Boniface M. Munyao Cause No.1650 of 2011;**

"where a stranger has participated as a candidate in an important position such as that of the General Secretary of the Union, the election cannot be said to have been conducted substantively in accordance with the law as to elections.

... He was not a legitimate candidate and his participation in the election ... closed out other candidates who may have been legitimately nominated from emerging as the probable winners."

In this case, there were no legitimate elections because a candidate who was not eligible was cleared to vie for a position. There must therefore be fresh nominations for the position to give a chance to any candidate who may have wished to vie to do so. It will also give a chance to the members who overwhelmingly rejected the petitioner by a vote of 180 against his 96 votes to pick a candidate of their choice.

The Respondents raised the issue of non-joinder of parties. It is my opinion that it will not be necessary to make a determination on this issue as it is not relevant to the determination of the substantive issue in dispute in this petition. As I stated earlier, there is no valid constitutional issue in this dispute and the petition should not have been filed at all. The petitioner should instead have filed a normal claim.

For the foregoing reasons, I find the petition without merit and dismiss it. Each party will bear its costs.

Judgement Dated, signed and delivered this 29th day of July, 2016

MAUREEN ONYANGO

JUDGE