



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

AT NAIROBI

PETITION NO.111 OF 2016

SAMUEL MUGA OLALE

DR. CONSTANTINE WASONGA

JANEPHA KEMUNTO KUMBA

NAFTALY RUGARA MUIGA

**(All suing as Chairman, Secretary General, Treasurer
and Organising Secretary of Universities**

Academic Staff Union (UASU).....PETITIONERS

VERSUS

THE REGISTRAR OF TRADE UNIONS.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

AND

PROF. SAMUEL S. KUBASU.....INTENDED INTERESTED PARTY

AND

GEORGE LUKOYE MAKOKHA

PETER LEMOOSA

DOMINIC MENGE S NYASETIA

CALEB SHIVACHI.....INTENDED INTERESTED PARTIES

RULING

1. On 8th August 2016, the Petitioners moved the court through application and Notice of Motion seeking urgent orders against the respondents. On 1st September 2016, prof. Samuel S Kubasu moved the court

through Notice of Motion seeking to be enjoined herein as an interested Party. On 13th September 2016, George Lukoye Makokha, Peter Lemoosa, Dominic Menge S Nyasetia and Caleb Shivachi also moved the court to be enjoined herein as interested parties.

2. Noting the 2 applications now filed by the intended interested parties, the court directed that these be heard first before hearing the petitioner's application.

3. Prof. Kubasu is seeking to be enjoined herein on the grounds that the issue raised he on the UASU Election Commission and to the 1st respondent, Registrar of Trade Unions are what have formed the basis to decline registration of the Petitioners as UASU officials. He participated in the UASU elections and vied for Secretary General and is afraid that his right to a fair hearing, the right to a free and fair election will be infringed. The Petitioners have constantly mentioned him in the proceedings but deliberately excluded him as a party. The enjoinder will enable the court to effectually and completely adjudicate on the matter.

4. In his Supporting Affidavit, Prof Kubasu avers that UASU conducted national elections on 22nd July 2016 and he vied for the office of secretary general. He appealed the results to the UASU Electoral Commission and brought the same to the attention of the Registrar of Trade Unions. The elections were not carried out in accordance with the UASU constitution, the Labour Relations Act and the constitution of Kenya. The elections were not free and fair as non-registered delegates were allowed to participate in the same and such delegate did not vote by secret ballot. He appealed and objected against the registration of the purported elected officials and the Registrar of Trade Unions has made a decision not to register these persons as officials of UASU and the proceedings herein require him to shed light on the same.

5. In the application of George Lukoye Makokha, Peter Lemoosa, Dominic Menge S Nyasetia and Caleb Chivachi, the enjoinder herein is sought on the grounds that they are members of UASU and attended as delegates in the national elections of 22nd July 2016 the outcome of which is the subject matter herein. That their fundamental rights to a fair and democratic election were violated and only fair and just that they be enjoined to ventilate their views. That the Petitioners have usurped office, edging out the registered officials hence paralysing preparation for repeat election.

6. In the Supporting Affidavit of Makokha avers that he is a senior lecturer and branch secretary UASU Kenyatta University Chapter and was thus a delegate at the national elections on 22nd July 2016 where he expected that there would be free and fair elections. The Registrar of Trade Unions has directed fresh elections of UASU upon hearing and assessing the materials and evidence presented by Prof Kubasu, the Labour Officer Kisumu and the Electoral Commission.

7. To date no elections have been called or held as the Petitioners are behind such failure. The old officials have been edged out and cannot organise elections. Locks to the UASU offices have been changed preventing access so as to organise fresh election. The Petitioners have printed letterheads bearing names in their newly elected capacities, met CS education on 27th July 2016 in the purported capacities, purported to negotiate a CBA with Dedan Kimathi University of Science and Technology and convened meetings for UASU. That without change in the UASU register as at 21st July 2016, the office bearers have not changed and the Petitioners are therefore in contravention of section 35(5) and (6) of the Labour Relations Act for purporting to act for the union without change of registered officials to themselves.

8. Mr Makokha also avers that he has seen an application for the registration of the Petitioners as interim officials but this would amount to legitimisation of the results of an abortive election and circumvent the orders of the Registrar of Trade Unions. That such orders of Registrar of Trade Unions are final in nature and by leaving the intended interested parties, the court will have nothing to adjudicate upon. The court will be putting illicit group to manage the union elections whose results will be obvious and such will contravene section 35(3) and (4) of the Labour Relations Act.

9. That the Petitioners have lied that the Electoral Commission dismissed Prof. Kubasu's appeal whereas by their letter of 1st August 2016 the Petitioners agree with him on his complaints and the

recommendation by the Registrar of Trade Unions to annul the elections. The Petitioners are thus stalling elections by filing this Petition with the court. The Registrar of Trade Unions made a ruling that the elections were not by secret ballot as photos of the elections were able to capture. That Garissa chapter sent 14 delegates, Joust and SEKU sent 15 delegates each making a total of 44 delegates who attended and voted against the union constitution. That the 44 delegate did not qualify to participate in the elections. And that the elections were conducted contrary to section 25 and 34 of the Labour Relations Act and article 14(e) of the union constitution.

10. Mr Makokha also avers that the Registrar of Trade Unions had appointed a returning officer who presented form Q and thus noted by permitting unqualified delegates to vote, section 25(5) of the Labour Relations Act was violated. There is no appeal against the Registrar of Trade Unions in rejecting Form Q within 30 days are required by section 30 of the Labour Relations Act. The decision by the Registrar of Trade Unions for a fresh election is still in force. As such, there should be enjoinder of the intended interested parties to shed light in the issues set out above.

11. Dr. Caleb Shivachi also filed his Supporting Affidavit and avers that he is a member of the Union and was a delegate at the national elections and is in support of averments made by Mr Makokha in his affidavit in support of enjoinder herein.

12. The Petitioners filed grounds of Opposition to application for enjoinder of the intended interested parties. That there is no special interest demonstrated by the intended interested party that will help the court arrive at a just decision and that such parties are just members of the union and one of the many contestants who lost at the national elections and has no interest in the union over and above any other member. There is no application to challenge the election results and thus there is no locus standi of the intended interested parties to be enjoinder in this case. Any interest is represented by the respondents particularly the Registrar of Trade Unions who received complaints upon the union national elections. The participation in this suit will not be of any value but to cloud the real issues for determination.

13. The Petitioners also submit that in **The Commissioner of Co-operative Development versus Thika Coffee Mills Ltd [2012] eKLR**, the court declined to enjoin a party who failed to demonstrate what capacity the joinder would be served and the relief sought. In this case the intended interested parties do not state what relief they are seeking and their case being that against the petitioners, such can be addressed through a different petition/case.

14. The Petitioners also submit that there is no demonstration that by participation herein the court will be able to determine the dispute effectively. That in **Kingori versus Chege & 3 Others [2002] 2 KLR** the court held that the applicant's joinder would not held the court in any way. That a party must demonstrate that they are a necessary party and a proper party by setting out specific reliefs that should come out of the case. The orders sought herein cannot be in the aid of the intended interested parties as the Petitioners seek remedies directed at the Registrar of Trade Unions sued as a public officer and based on information that the office has and a decision made thereon. Such an office should act independently and not be influenced by complaints of third parties who now seek to be enjoinder herein as interested parties. This would amount to sanctioning an illegality. Section 34(4) of the Labour Relations Act requires that Registrar of Trade Unions to act independently.

15. That the Petition herein relate to the refusal by the Registrar of Trade Unions to issue the Petitioners with a Certificate and such refusal can only be challenged in court. The intended interested parties can therefore argue their case against the respondents and not disturb the petitioner's case and applications should be dismissed.

16. The respondents, the office of Registrar of Trade Unions and the Attorney General support the applications filed by the intended interested parties. The respondents opted not to file any responses in this regard.

Determination

Should the intended interested parties be enjoined herein?

17. An 'Interested party' has now been defined under **The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedures Rules, 2013** thus;

'Interested Party' means a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a Party to the proceedings or may not be directly involved in the litigation;

18. In **Judicial Service Commission versus Speaker of the National Assembly 7 Others, Petition No. 518 of 2013**, where the court held;

The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2012, defines an interested party as;

A person or entity that has an identifiable stake or legal interest in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation.

19. From the foregoing it is clear that an interested party as opposed to an amicus curiae or a friend of the court may not be wholly indifferent to the outcome of the proceedings in question. He is a person with an identifiable stake or legal interest in the proceedings hence may not be said to be wholly non-partisan as he is likely to urge the Court to make a determination favourable to his stake in the proceedings. Such a determination must be related to the remedy sought or stake that is set out. It cannot be left for the court to determine such remedy or stake. Clarity must be built by the party seeking to be enjoined in a suit already filed by setting out what remedy and or stake there exists.

20. **Rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules** defines an interested party as a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the Court, but is not a party to the proceedings or may not be directly involved in the litigation. The issue was then more aptly addressed by the Supreme Court in **Communications Commission of Kenya and 4 others versus Royal Media Services limited and 7 Others [2014] eKLR** where the court held;

... an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is the one who will be affected by the decision of the court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause... a party could be enjoined in a matter for the reasons that:

i. Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;

ii. Joinder to provided protection of the rights of a part who would otherwise be adversely affected in law;

iii. Joinder to prevent a likely course of proliferated litigation.

21. This also speaks to the cited case of **Kingori versus Chege & 3 others**, the court set out the principles to guide the court in making such a determination thus;

1. He must be a necessary party

2. He must be a proper party

3. In the case of a defendant there must be relief flowing from that defendant to the plaintiff

4. *The ultimate order or decree cannot be enforced without his presence in the matter*

5. *His presence is necessary to enable the court too effectively and completely to adjudicate and settle all questions involved in the suit.*

22. The Court in the case of **Jacob N Muvengei versus Speaker Nairobi City County Assembly and Chege Mwangi & Others [Proposed interested parties], cause no.2108 of 2014** held that Order 1 rule 10(2) of the Civil Procedure Rules provide clear wording for a person to be enjoined as plaintiff or defendant. Such joinder must be with the purpose to ensure that the *presence before the Court may be necessary to enable the Court effectually and completely to adjudicate upon.*

23. Prof. Kubasu application is premised on the basis that he has a right to a free and fair elections as well as his right to be heard and that the Petitioners have relied on his complaint made to the Registrar of Trade Unions to file the Petition herein whereas George Lukoye Makokha, Peter Lemoosa, Dominic Menge Nyaseta and Caleb Shivachi grounds are that they have the right to fair and democratic elections. The Petition against the respondents is premised on the grounds that the Petitioners are the validly elected officials of the union and should be issued with a certificate of registration. All the parties have heavily relied on the provisions of section 35 of the Labour Relations Act and the powers of the Registrar of Trade Unions therein.

24. It is imperative to state here that, joinder of a party to an ongoing suit is not granted. The party suing is the one to determine who the Respondent should be and where wrongly sued, the petitioner stands to suffer a sanction of costs. To therefore seek to be enjoined in a suit, the interest due must be established on the onset. It should not be left to the court to discern the interest or for the Petitioners to do the same.

25. The subject of the Petition herein relate to an election allegedly conducted on 22nd July 2016 whose returns were submitted with the Registrar of Trade Unions. From such elections, the Petitioners are seeking to be issued with a certificate of registration, Prof Kubasu lodged a complaint with regard to the same election with the Registrar of Trade Unions whereas George Lukoye Makokha, Peter Lemoosa, Dominic Menge Nyaseta and Caleb Shivachi state that as members of the union they are entitled to a free, fair and democratic election. Where Prof. Kubasu had lodged a complaint with the Registrar of Trade Unions, that is the office that should give him feedback and where no response is given, the Labour Relations Act is clear on what cause of action can arise therefrom. It is not lost that the respondents are in support of the applications for the joining of the interested parties. However, even where there is no objection, it is the office of the Registrar of Trade Unions that must address complaints lodged by a party not satisfied with an election of a trade union. Where the 1st Respondent does not act in accordance with the law, a party such as Prof. Kubasu can lodge his claim setting out his rights to be asserted. In the same regard, George Lukoye Makokha, Peter Lemoosa, Dominic Menge Nyaseta and Caleb Shivachi as members of the Union, where dissatisfied with the outcome of an election, recourse is with the Registrar of Trade Unions or with the court. It cannot be by joining in the Petition now filed by the Petitioners against the same party who is supposed to act with regard to receiving returns after a union election unless there is a specific remedy sought against the respondent. To allow the intended interested parties join in the Petition without clarity as to the nature of remedy sought noting the specific remedies the Petitioners seek against the respondents would only serve to mar the issues herein for determination.

26. In **HCCC Petition No.228 of 2016, Consumer Federation of Kenya (COFEK) [suing through its officials Stephen Mutoro and Others] versus University of Nairobi & Others**, the court held;

It is now clear that parties are not to be enjoined in proceedings as a matter of course. A party must illustrate the stake claimed in the litigation prior to being enjoined. Merely because a party's name is mentioned or referred to by a party will not suffice. The question to be asked by the court is what a party's stake is in the litigation. Secondly, will the party be of any assistance if enjoined. Thirdly, does the party stand to suffer any prejudice if the application is denied and, if so, how will the party be affected.

27. Where the intended interested parties are dissatisfied with the outcome of the elections held on 22nd

July 2016, nothing stops them from lodging a separate and distinct claim setting out the remedies sought. The right to a fair election must be set out by prof. Kubasu by stating who has violated such right and what remedy (remedies) are sought as a result. Where the intended interested parties also seek to enforce the right to a fair and democratic election, such must be articulated on its merits and the rival party clearly set out for the court to issue orders that are specific, clear and enforceable. Such orders cannot be claimed at large and against any party without stating if such a party is the Petitioners or the respondents. The submissions that the Registrar of Trade Unions ordered for a repeat of the elections, such can be articulated by the Registrar of Trade Unions in response to the Petition and thus, the respondents are sufficient to run the course of the suit as they have all relevant information.

28. To thus be enjoined herein will only add to a protracted suit that does not add any value to the work of the union. The petitioner's case is set out against the respondents, the Registrar of Trade Unions has issued a directive that is subject of these proceedings and as such, the application before court by the Petitioners must be addressed on its merits. I find no proper cause of action or case for defence set out by the intended interested party. If anything, all the issues submitted in both applications can well be canvassed by the respondents who are now seized of all the complaints lodged by Prof Kubasu, the Labour Officer Kisumu and the Electoral Commission.

Application for joinder by the applicants as intended interested parties herein filed on 1st September 2016 and 13th September 2016 lack merit and are declined. The applications are hereby dismissed. Each party to bear their own costs.

Orders accordingly.

Delivered in open court at Nairobi this 6th day of October year 2016.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Lilian Njenga

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