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Date Delivered:	02 Sep 2016
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	Linnet Ndolo
Citation:	Robert Nyabuto Nyabwocha v Ronald Kiprotich Tonui & another [2016] eKLR
Advocates:	Ms. Alwala for the Petitioner Mr. Ashitiva for 1st Respondent Mr. Okweh Achiando for the 2nd Respondent
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	petition awarded
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**PETITION NO. 28 OF 2016**

**[FORMERLY NAKURU ELRC PETITION NO. 12 OF 2016]**

**ROBERT NYABUTO NYABWOCHA.....PETITIONER**

**VS**

**RONALD KIPROTICH TONUJ.....1<sup>ST</sup> RESPONDENT**

**KENYA UNION OF POST PRIMARY EDUCATION TEACHERS.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Petitioner, Robert Nyabuto Nyabwocha brought this Petition to challenge the eligibility of the 1<sup>st</sup> Respondent, Ronald Kiprotich Tonui to seek re-election as Assistant National Treasurer of the 2<sup>nd</sup> Respondent.

2. The 2<sup>nd</sup> Respondent, Kenya Union of Post Primary Education Teachers (KUPPET) is a trade union registered in Kenya whose constitution requires that elections for national officials be held every five (5) years.

3. Pursuant to elections held by the 2<sup>nd</sup> Respondent in 2011, the 1<sup>st</sup> Respondent was elected to the position of Assistant National Treasurer, a position he intended to defend in the elections scheduled for 19<sup>th</sup> March 2016.

4. At the interlocutory stage, I directed that elections with respect to all positions save for that of Assistant National Treasurer which is the subject of this Petition, would proceed as scheduled.

**The Petition**

5. The Petitioner states that the 1<sup>st</sup> Respondent is a State Officer as defined under Article 260 of the Constitution, holding the position of Member of Parliament in the National Assembly.

6. The Petitioner further states that under Article 77 of the Constitution, a full time State Officer is restricted from participating in other gainful employment.

7. Additionally under Article 99(2) a person is disqualified from being elected as a Member of Parliament if he is a State Officer, or other public officer other than a Member of Parliament. It would therefore be presumed that before being elected as a Member of Parliament, the 1<sup>st</sup> Respondent had resigned as a teacher.

8. The Petitioner contends that under Section 33 of the Labour Relations Act, 2007 no person is eligible to vote in union elections unless he is employed in the sector for which the trade union is registered.

9. In the run up to the elections of 2<sup>nd</sup> Respondent in March 2016, the Governing Council, through the Secretary General, cleared the Petitioner and the 1<sup>st</sup> Respondent to contest for the position of Assistant National Treasurer.

10. The Petitioner objected to the 1<sup>st</sup> Respondent's eligibility to contest for the position of Assistant National Treasurer on the ground that the 1<sup>st</sup> Respondent is not constitutionally and legally eligible to contest for the said position.

11. It is the Petitioner's case that the 2<sup>nd</sup> Respondent's action of clearing the 1<sup>st</sup> Respondent to contest in the elections is unconstitutional and contrary to the Labour Relations Act for the following reasons:

a. Being a Member of Parliament, the 1<sup>st</sup> Respondent is a State Officer within the meaning of Article 260 of the Constitution. Article 77 expressly bars a State Officer from participating in any gainful employment. The position of Assistant National Treasurer is such gainful employment;

b. Being a State Officer, within the meaning of Article 260 of the Constitution, the 1<sup>st</sup> Respondent cannot engage in gainful employment as a teacher. He is therefore deemed under the law not to be a member of the Trade Union and cannot participate in its affairs;

c. Being a State Officer and to have been eligible to hold that position, the 1<sup>st</sup> Respondent ought to have relinquished his position as a teacher before election into office as a Member of Parliament;

d. Article 99 of the Constitution declares that a person who holds a State Office other than that of Member of Parliament is not eligible for election as a Member of Parliament.

12. The Petitioner states that to the extent that the 1<sup>st</sup> Respondent cannot engage in any gainful employment while he is a State Officer, he is presumed under the law to have resigned as a teacher before he was elected. He is therefore not a member of the 2<sup>nd</sup> Respondent and under Section 33 of the Labour Relations Act, he is not eligible to vote or be elected into office. On the strength of this averment the petitioner maintains that the 1<sup>st</sup> Respondent ceased to be a member of the 2<sup>nd</sup> Respondent as provided under the 2<sup>nd</sup> Respondent's Constitution.

13. The Petitioner seeks the following remedies:

- a. A declaration that the 1<sup>st</sup> Respondent, being a Member of Parliament and therefore a State Officer is not eligible to vie for or hold the office of Assistant National Treasurer of the 2<sup>nd</sup> Respondent;
- b. A declaration that the act of the 1<sup>st</sup> Respondent in offering his candidature for the position of Assistant National Treasurer and the act of the 2<sup>nd</sup> Respondent in clearing the 1<sup>st</sup> Respondent to vie for the position contravene Article 77(1) as read together with Articles 99 and 260 of the Constitution.

### **The Respondents' Reply**

14. The 1<sup>st</sup> Respondent, Ronald Kiprotich Tonui swore a replying affidavit on 4<sup>th</sup> April 2016. He depones that as a teacher by profession, he is qualified under the Labour Relations Act, to vie for any position in the 2<sup>nd</sup> Respondent Union.

15. Tonui further states that as a Member of Parliament he is not precluded by either the Union Constitution or the law from running for office in the Union. He adds that there is no law that bars a Member of Parliament who is a teacher or former teacher from contesting for any seat in the Union.

16. According to Tonui, he is not in full time employment in the National Assembly and is not therefore barred by Article 77 of the Constitution of Kenya.

17. The 2<sup>nd</sup> Respondent's reply is contained in a replying affidavit sworn by its Secretary General, Maurice Akelo Misori on 14<sup>th</sup> March 2016.

18. Misori depones that the 1<sup>st</sup> Respondent is a teacher by profession and was elected as Assistant National Treasurer in the 2<sup>nd</sup> Respondent's elections held in 2011. He was subsequently elected as Member of Parliament for Bomet Central Constituency in March 2013.

19. Misori further depones that under Article 13 of the 2<sup>nd</sup> Respondent's Constitution, the 1<sup>st</sup> Respondent is entitled to contest in the Union elections. Additionally, Section 33 of the Labour Relations Act does not bar the 1<sup>st</sup> Respondent from participating in the elections as he is a registered teacher and therefore belongs to the sector for which the 2<sup>nd</sup> Respondent is registered.

20. Misori goes on to depone that at a meeting of the National Delegates Conference, at which the Petitioner was present, the issue of the 1<sup>st</sup> Respondent holding the position of Assistant National Treasurer while being a Member of Parliament was discussed. It had been resolved at this meeting that the 1<sup>st</sup> Respondent would continue to serve as Assistant National Treasurer and this resolution was

binding on the Petitioner.

21. The 2<sup>nd</sup> Respondent also filed grounds of opposition on 22<sup>nd</sup> March stating that:

- a. The Petition is incurably defective because it does not raise any legitimate constitutional questions to be addressed by the Court;
- b. The Court has no jurisdiction to deal with the issues raised in the Petition;
- c. The Petitioner has no *locus standi* to lodge the Petition.

### Findings and Determination

22. There are five issues for determination in this Petition:

- a. Whether the Petition raises legitimate constitutional questions capable of determination by the Court;
- b. Whether this Court has jurisdiction to hear and determine the Petition;
- c. Whether the Petitioner has *locus standi* to bring the Petition;
- d. Whether the 1<sup>st</sup> Respondent is qualified to vie for the position of Assistant National Treasurer of the 2<sup>nd</sup> Respondent;
- e. Whether the Petitioner is entitled to the remedies sought.

### Constitutional Questions

23. It was submitted on behalf of the 2<sup>nd</sup> Respondent that the Petitioner's case has not been pleaded with reasonable precision as set out under ***Anarita Karimi Njeru v Republic (1976-1980) KLR 1272***. In this regard, it is the 2<sup>nd</sup> Respondent's contention that the Petition does not state the constitutional provisions alleged to have been violated and the acts or omissions complained of, with reasonable precision.

24. The 2<sup>nd</sup> Respondent further submits that apart from citing omnibus provisions of the Constitution, the Petition does not provide particulars of the complaints, the manner of infringement or the jurisdictional basis of the action before the Court.

25. I disagree. Looking at the Petition, the constitutional provisions relied upon are clear. In particular, Article 77 on which this Petition turns has been specifically cited. I therefore find nothing to suggest that the requirement for reasonable precision in framing of issues set out in ***Anarita Karimi Njeru (supra)*** has not been satisfied.

## Jurisdiction of the Court

26. The 1<sup>st</sup> Respondent specifically challenges the jurisdiction of the Court to entertain the present Petition, stating that the 2<sup>nd</sup> Respondent is governed by its Constitution which sets out the parameters for membership and eligibility to participate in elections.

27. The 1<sup>st</sup> Respondent therefore submits that this Court has no jurisdiction to entertain a claim arising from a lawful matter that has been agreed upon by the members. In support of this position, Counsel for the 1<sup>st</sup> Respondent referred the Court to Article 41(4)(a) of the Constitution of Kenya which provides that every trade union and employer's organization has the right to determine its own administration, programmes and activities.

28. It is indeed true that the Court should not interfere with the internal affairs of a trade union. This does not however bar the Court from inquiring into allegations of constitutional or legal breaches in the running of these internal affairs.

29. I have already reached the conclusion that the Petition before the Court raises valid constitutional questions capable of determination and as held by **Majanja J** in **United States International University v Attorney General [2012] eKLR** and the Court of Appeal in **Daniel N. Mugendi v Kenyatta University and 3 Others [2013] eKLR** this Court has jurisdiction to entertain constitutional questions arising from employment and labour relations matters.

## Locus Standi

30. It was also suggested by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents that the Petitioner had no *locus standi* to bring the Petition. In support of this line of argument, the Court was referred to the Court of Appeal decision in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR** where the Court stated the following:

***“we must hasten to make it clear that the person who moves the court for judicial redress in cases of this kind must be acting bona fides with a view to vindicating the cause of justice. Where a person acts for personal gain or private profit or out of political motivation or other oblique consideration, the Court should not allow itself to be seized at the instance of such person and must reject their application at the threshold.”***

31. The Respondents fault the Petitioner's action on two counts. First, it took the Petitioner three years to raise the issue of the 1<sup>st</sup> Respondent being the Assistant National Treasurer of the 2<sup>nd</sup> Respondent while holding the office of Member of Parliament. Second, the Petitioner is actuated by his personal desire to be the sole candidate for the position of Assistant National Treasurer.

32. Articles 22 and 258 of the Constitution and the Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules (Mutunga Rules) have undeniably expanded the legal capacity to sue. I however agree that this does not provide a carte blanche for all manner of complaints before the Court.

33. Nevertheless, I take the view that the ***Mumo Matemu Case*** is distinguishable from the current Petition because the Petitioner has a direct stake both as a member of the Union as well as a candidate for the position of Assistant National Treasurer.

34. With regard to the delay in raising the issue at hand, the only thing to say is that the Court will not confirm an illegality merely because of persistence and longevity.

### **The 1<sup>st</sup> Respondent's Eligibility**

35. I now turn to the substantive question of whether the 1<sup>st</sup> Respondent is eligible to contest in the elections for the position of Assistant National Treasurer.

36. Argument was advanced as to whether the Petitioner, who admittedly is no longer an active teacher is still a member of the Union and therefore eligible to hold office. I do not think this is where the substance of this dispute lies since under Section 31(1) of the Labour Relations Act, a person who has been engaged or employed in the relevant sector retains the right of membership.

37. The real question is whether, the Petitioner who is a Member of Parliament and therefore a State Officer as defined in Article 260 can hold the position of Assistant National Treasurer in the Union.

38. Article 77(1) of the Constitution provides as follows:

**77. (1) A full-time State Officer shall not participate in any other gainful employment.**

39. It was submitted on behalf of the Respondents that a Member of Parliament is not a full time State Officer and the Court was referred to the High Court decision in ***John Okelo Nagafwa v Independent Electoral and Boundaries Commission & 2 Others [2013] eKLR***. In this case, **Tuiyott J** while declining an invitation to determine the question whether or not a Senator is a full time State Officer, ruled that the Senator who appeared as Counsel in an election petition had not contravened Section 26 of the Leadership and Integrity Act which defines the term 'gainful employment.'

40. So is a Member of Parliament a full time State Officer" In submitting in the affirmative, Counsel for the Petitioner made reference to Article 250(5) which provides that members of commissions created under Article 248 may serve on part time basis. Counsel was of the view that if it was intended that a Member of Parliament would serve on part time basis, the Constitution would have expressly stated so.

41. In order to determine the question whether a Member of Parliament is a full time State Officer, one must examine the functions assigned to this office. The role of a Member of Parliament as defined in the Constitution is three fold; first, representation, second enacting legislation and third, oversight.

42. In this respect, the Court takes judicial notice that the operative system of government in this country is presidential where members of the Executive do not ordinarily attend parliamentary sessions. The result is that Members of Parliament are expected to expend significant time undertaking parliamentary business in committees, quite apart from attending and participating in sessions of the full House.

43. Additionally, in order to play their legislative and oversight roles effectively, Members of Parliament must spend time reading in order to understand the issues before them. Moreover, Members of Parliament must attend to constituency matters.

44. In a nutshell, one cannot gauge the working hours of a Member of Parliament simply by looking at the hours spent in the Chamber. In my view, looking at the roles and functions assigned to Members of Parliament, they cannot be said to be part time State Officers. I therefore find that a Member of Parliament is a full time State Officer.

45. The next question has to do with the meaning of 'gainful employment'. Section 26(1) of the Leadership and Integrity Act which was relied on in the ***ohn Okelo Nagafwa Case*** defines 'gainful employment' as:

***“work that a person can pursue and perform for money or other form of compensation or remuneration which is inherently incompatible with the responsibilities of the state office or which results in the impairment of the judgment of the state officer in execution of the functions of the state office or results in a conflict of interest in terms of Section 16.” [Emphasis added]***

46. Article 8.6 of the 2<sup>nd</sup> Respondent's Constitution and Rules provide that the National Executive Board which comprises of ten elected national officials, including the Assistant National Treasurer shall work full time. A plain reading of the Union Constitution reveals that the position of Assistant National Treasurer is a full time job. It seems to me therefore that this position is clearly incompatible with the office of Member of Parliament which is also a full time job.

## Remedies

47. I therefore find that the 1<sup>st</sup> Respondent is not qualified to contest in the elections for the position of Assistant National Treasurer of the 2<sup>nd</sup> Respondent as long as he holds the office of Member of Parliament.



48. Being aware that the position of Assistant National Treasurer has remained vacant since March 2016, I make the following orders:

- a. The 2<sup>nd</sup> Respondent is directed to conduct elections for the position of Assistant National Treasurer within the next 60 days from the date of this judgment;
- b. The 1<sup>st</sup> Respondent is barred from contesting in the said elections as long as he holds the office of Member of Parliament.

49. I award the costs of this Petition to the Petitioner.

50. These are the orders of the Court.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 2<sup>ND</sup> DAY OF SEPTEMBER 2016**

**LINNET NDOLO**

**JUDGE**

Appearance:

Ms. Alwala for the Petitioner

Mr. Ashitiva for 1<sup>st</sup> Respondent

Mr. Okweh Achiando for the 2<sup>nd</sup> Respondent



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