



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 129 OF 2012

CHARLES OKAYO & 7 OTHERSCLAIMANTS

VERSUS

KENYA ENGINEERING WORKERS UNIONRESPONDENTS

J U D G M E N T

This is an election dispute filed by the applicants challenging the elections of official of the 1st respondent in General meeting held on 19/2/2011 at Mombasa. It is brought under Article 41(2) (c) of the constitution of Kenya, Section 4(2) of the Labour Relations Act and rule 15(d) and 17(a) of the 2nd respondent constitution.

The gravamane of the claimant's case is that the said general meeting of 1st respondent of 19/2/2011 was not convened in accordance with rule 15(d) of the union constitution and as such their rights to contest for the various offices were violated and denied in favour of their opponents who were declared winners unopposed by the 3rd respondent and registered as duly elected officials of the 4th respondent.

The 1st and 2nd respondents have opposed the claim and the reliefs sought by contending that the general meeting was properly convened by serving a two weeks notice to all members. That only the elected officials had applied in time for election to various offices and as such they were declared elected unopposed. They also opposed the claim on the ground that the same was

res judicata with respect to civil suit No. CMCC 202 of 2011 in which the Applicant had sued the elected officials of the 1st respondent and the court struck it out on ground of jurisdiction.

The 3rd respondent did not defend the claim but only filed a replying affidavit to oppose the interlocutory application. The 4th respondent filed nothing in defence.

After close to two years delay the case was heard on 20/5/2013 and 3/6/2013 when the 6th claimant Mr. Leonard Luvai Lumadede testified on behalf of the claimants as CW1 while Duncan Ndegwa Mwaura and Oganda Patel testified as RW1 and 2 for the respondent. The rest of the parties did not call any witnesses in their defence.

CW1 is a machine operator at Cook and Light company since 1992 and a member of the 1st and 2nd respondents. He pays subscription for the union by check off system and demonstrated by the payslip annexed to the claim. That all the other claimants are members as well according to the documents

annexed to the claim.

That on 23/1/2011 there was a general meeting to elect official for 1st respondent at Lasco Hall but the 3rd respondent postponed the same for two weeks because the claimants said they were contesting. They waited for a notice for the fresh meeting in vain and the 1st respondent's office on 7/2/2011 for update and they were told to wait for the notice. On 12/2/2011 they were verbally invited to the 1st respondents office to share the offices amicably but they refused and demanded for elections. That on 13/2/2011 they received rumors that the elections were scheduled to be held on 19/2/2011. They then applied for the permission to contest the various offices by letter delivered by the 5th claimant to the 2nd respondent in Nairobi.

That they attended election meeting at Tononoka Hall and the 3rd respondent came with ballot boxes. After registering the members in attendance, she said that the claimants application to contest for various offices were made late. She then declared the incumbents as elected unopposed.

According to CW1 there was no valid election under rule 17 of the union constitution which provides for election by secret ballot. That the meeting was also invalid because there was no service of the mandatory 2 weeks notice for commencing the meeting. That the late application was also caused by failure to serve the said 2 weeks notice.

That they protested to the 4th respondent by letter who ignored the objection and referred the claimants to this court. According to CW1 the labour office received the notice for the election on 14/2/2011 while the CW1's employer received the notice on 19/2/2011 in the day of election. He prayed for fresh elections to be held for the 1st respondent. As regards the issue of *res judicata* he maintained that the suit before the lower court was never determined on merit but only struck out on ground of jurisdiction.

On cross examination he denied receiving the letter of notice dated 5/2/2011 and insisted that the letter was sent to the respective employers on 19/2/2011. He denied knowledge of the notice of election date as early as 12/2/2011 and contended that he only learned from Tanui on 13/2/2011 that the election meeting was to be held on 19/2/2011 which was only a rumour. That they then took their applications to Nairobi on 14/2/2011. He admitted that the date of their application letter appeared tempered with of which he said that the letters had been written earlier to seek election during the earlier meeting of 23/1/2011 which was postponed.

That they only amended the dates to update them for meeting rumoured to be for 19/2/2011. That they delayed delivery of the application letters because they were waiting for notice for the next meeting which was never served. That the election for 23/1/2011 were postponed because the law had not been complied with. That the claimants raised objection to the 3rd respondent during the meeting but she refused to listen to them and referred them to the General Secretary of the 2nd respondent. He admitted that the claimants did not apply in time but the incumbents applied in time. That the 4th respondent referred the claimants to this court after

he was served with an order from the lower court.

DW1 is employed by Mabati Rolling Mills and is the Branch Secretary for the 1st respondent for the last 12 years. One of his duties is to call for elections under rule 15(d) of the union constitution. That he received a letter from 2nd respondent General Secretary instructing him to hold branch elections for the 1st respondent. That on 23/1/2011 the 1st respondent held a meeting but the 3rd respondent postponed it after some people started to nominate candidates from the floor of the meeting against the union constitution.

That on 5/2/2011 the RW1 wrote another notice for Annual General Meeting (AGM) to be held on 19/2/2011 and distributed it to the chief shopstewards immediately. That the AGM was held on 19/2/2011 at Tononoka Hall Mombasa and elections were presided over by the 3rd respondent. That after reading the relevant provisions of the union constitution she read through the names of the applicants and

the dates of the respective application to the attendants. She then compiled the list of the qualified and that of the unqualified applicants according to those who had applied at least a week before the AGM.

That she read the list of the qualified applicants according to their respective office and they became winners because their opponents were disqualified due to late application. That there was no case filed before the election to object to it. He denied that notice of the AGM was received late. He admitted that the disqualified applicants had written their application letters before but they delayed delivery to the General Secretary.

On cross examination he confirmed that in 2006 he was elected unopposed just as in 2011. That according to him AGM notice is supposed to be served upon the chief shopstewards because it is not possible to serve all members as provided for in the union constitution. He admitted that he served the chief shopstewards only with the notice for the 19/2/2011 AGM. That he trusted that the stewards were going to notify their members. He admitted that he delivered the notice to the company on 5th, 6th and 7th of February 2011. that he served Mr. Douglas Onyango, the shopsteward for Mabati Rolling Mills on 8/2/2011 but he did not sign. That on the same 8/2/2011 he served Mr. Patel the Chief shopsteward for Cook and Light on the same 8/2/2011.

On being shown the notice served on Patel of Cook and Light on 19/2/2011 he admitted that it is the notice he signed. He denied issuing late notice in order to bar his opponents from competing with him. He agreed that he won the seat because his opponent was disqualified for late application. He admitted also that the disqualified candidates were members qualified to vote and contest in the elections save for the late application. He confirmed that John Masika who was elected chairman was a paid up member but not working in the industry after leaving job 3 or 4 months prior to the elections. That he did not have any letter from the Registrar of Trade Unions to allow him continue serving in the union. He however denied that only the incumbents official retained their offices.

RW2 is the chief Shopsteward for Cook and Light since 2010. He admitted that he was served with the notice of the AGM on 8/2/2011 and took it to the HR Manager on 9/2/2011 to secure permission for the employees to attend elections on 19/2/2011. That thereafter they pinned the letter of notice on the notice board for all the workers to see it. According to him the acknowledgement of receipt on the notice was altered to read received on 19/2/2011. Never the less his workers attended the AGM and he was elected as the Assistant Branch Treasurer. According to him some members complained that they were given the wrong date. Others were disqualified as candidates for applying to contest out of time.

On cross examination he told the court that on 8/2/2011 he was called to the branch of the 1st respondent where the branch chairman Mr. Masika gave him the AGM notice. He admitted that the handwriting and signature on the notice acknowledging receipt thereof as his. He however changed to say that he acknowledged receipt on 9/2/2011. He agreed that the period between 8/2/2011 and 19/2/2011 was less than 2 weeks. That his application to vie for an office was delivered in time. He admitted that he did not tell CW1 of the AGM notice although they work together because he never knew that he was interested in any seat. He just left the notice on the notice board.

He admitted that no one proposed him or seconded him at the floor of the AGM. He won automatically after his opponent was disqualified. That the 3rd respondent did not discuss disqualification with the members nor did she tell members present about the claimants late application for candidature. She came late and immediately conducted roll call. He denied that the AGM notice was not backdated. There was no objection during the AGM that the constitution was not followed. After the hearing the parties agreed to file written closing submissions but only the claimants did so.

It is no doubt that the court has the jurisdiction to determine the claim before it under Section 12 and 20 of the Industrial court Act because it concerns a dispute between members and their trade union. In addition Section 34 (e) of the labour Relations Act donates jurisdiction to this court to determine election disputes from trade unions. The issues for determination are:

a. whether the suit is *res judicata*

- b. **whether the AGM held by the 1st Respondent on 19/2/2011 was lawfully convened.**
- c. **Whether the business conducted by the said AGM of 19/2/2011 including elections of branch officials was lawful and valid.**
- d. **Whether the reliefs sought in the suit ought to issue.**

In answer to the first issue I have no doubt that the cause of action in the present suit is substantially the same as that in CMCC 202 of 2011. However it is my finding that the suit is not *res judicata* firstly because the parties to the dispute are not the same and secondly that the dispute in CMCC 202 of 2011 was not heard and finally determined on the merit by a court of competent jurisdiction.

The ruling of the lower court dated 15/4/2011 appreciated that Section 34 of the labour Relation Act ought to be given effect and struck out the lower court suit before determining it on the merits due to lack of jurisdiction. In his view he preferred that the suit be heard by this court. The suit is therefore properly before the court.

As regards the second issue it was submitted by the claimant that the AGM of 19/2/2011 was not convened in tandem with the 2nd respondents constitution. They relied on rule 15(a) of the said union constitution in submitting that the 1st respondents branch secretary did not serve the mandatory 2 weeks notice before the holding of the AGM. In response RW1 desperately contended that he served all the union members through their shop stewards for the respective companies. That he served the said shop stewards through their respective employers and trusted that the shop stewards would notify their members. He admitted serving RW2 at Cook and Light on 8/2/2011. That alone messed up the defence case.

However RW2 further mended the whole evidence of the RW1 when he contracted him by saying that he was called to the 1st respondents office on 8/2/2011 where he was served with notice for the AGM scheduled for 19/2/2011 by the branch chairman Mr. Masika. That by that time the AGM was less than 2 weeks away. He contradicted himself by saying that he acknowledged service of the notice by signing on 9/2/2011. He however admitted that the acknowledgment of receipt is dated 19/2/2011 the day when the AGM occurred. He admitted that he wrote and signed the acknowledgment but only stated that the date had been altered so as to appear as 19/2/2011. He could not however justify why after alleging service was 8/2/2011 he decided to acknowledge receipt on 9/2/2011.

without belabouring the point, the court is satisfied that the RW1 as Branch Secretary did not serve all the union branch members with at least 2 weeks notice before the holding of the AGM on 19/2/2013. The court is not in any doubt that RW1 was acting in collusion with the other branch officials and other new comers like the RW2 and that is why they were calling them to the office and secretly serve notice and collect and even deliver applications for them to the 2nd respondent to secure candidature before the deadline of one week to the AGM. In my considered view the whole idea was to either hold a secret AGM or hold one when they were sure their opponents would not be able to successfully apply for candidature before the deadline of one week to the AGM. I do not understand why the 3rd respondent did not stop the election again as she did on 23/1/2011 when similar illegality had been done. May be to her two wrongs made a right. This court sadly but firmly will not allow such illegality to last even for one day. It must stop forth with.

The court therefore finds and holds that the AGM of the 1st respondent held on 19/2/2011 was not convened according to rule 15(d) of the 2nd respondents constitution. Consequently the answer to the second issue for determination is in the negative.

As regards the third issue for determination, the court holds that the answer is also in the negative. An illegally convened AGM is invalid and all its business only amount to nullity including the elections of branch officials that day and their subsequent registration by the 4th respondent.

The last issue to consider is the prayers sought by the claimants in their suit. The court grants all the prayers sought save to add the following orders in view of prayer (e)

1. **the elections of the 1st respondents branch officials held on 19/2/2011 are hereby nullified.**
2. **The Branch officials who were in office before the elections held on 19/2/2011 are reinstated to hold office until new officials are elected.**
3. **The officials reinstated under (ii) above shall convene a special general meeting of the 1st respondent before the 15/10/2013 transact only the business of electing new Branch officials for the 1st respondent.**
4. **The said SGM to be strictly in accordance with the 2nd respondents constitution, the constitution of Kenya and the Labour relations and to be supervised by the Labour Officer Mombasa.**
5. **The cost of convening the AGM to be met by the 1st respondent.**
6. **The 1st and 2nd respondents are condemned to pay the claimants costs of this suit.**
7. **For avoidance of doubts, all lawful business and transactions entered into by the officials elected on 19/2/2011 with third parties on behalf of the 1st respondent are preserved.**

Orders accordingly.

Signed, dated and delivered this 26th August 2013.

ONESMUS MAKAU

JUDGE