



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**PETITION NO. 71 OF 2010**

**IN THE MATTER OF SECTION 22, 23(1) AND 165(D)(I) OF THE CONSTITUTION OF  
KENYA**

**AND**

**THE ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS  
UNDER SECTION 41(4) AND SECTION 47(1) OF THE  
CONSTITUTION OF KENYA AND ALLEGED CONTRAVENTION OF SECTION 171 AND 172  
OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF LABOUR INSTITUTIONS ACT CAP 2007 AND LABOUR RELATIONS  
ACT NO. 14 OF 2007**

**BETWEEN**

**ERIC BARARE**

**ORINA .....PETITIONER**

**AND**

**THE ATTORNEY GENERAL.....1<sup>ST</sup>**

RESPONDENT	
THE REGISTRAR OF TRADE UNIONS.....	2 <sup>ND</sup>
RESPONDENT	
THE INDUSTRIAL COURT OF KENYA .....	3 <sup>RD</sup>
RESPONDENT	
CENTRAL ORGANIZATION OF TRADE UNIONS.....	INTERESTED PARTY

### RULING

This ruling is in respect of two applications dated 12<sup>th</sup> November, 2010 and 24<sup>th</sup> November, 2010. In the first application, the petitioner sought the following substantive orders:

- “1. That the application filed herein be certified urgent and the same be heard ex parte in the first instance with respect to prayers 2 and 3 hereof.
  
2. That pending the hearing and determination of this application inter partes and/or until further orders of this court, the court be pleased to issue a mandatory injunction requiring the 2<sup>nd</sup> respondent to register and recognize the officials of the interested party elected on 7<sup>th</sup> June, 2009, subsequent to returns of the said elections filed with the 2<sup>nd</sup> respondent on 18<sup>th</sup> June, 2009 and also subsequent to orders issued on 11<sup>th</sup> June, 2010 by the High Court in Civil Case No. 243 of 2010, Paul Rukaria (suing as Chairman-elect), Jane Akinyi (Assistant Secretary-elect) and Benson Irungu (Third Trustee-elect) vs Eric Barare Orina.
  
3. That pending the hearing and determination of this application inter partes and/or until further orders of this court, the court be pleased to grant the petitioner a conservatory order by way of an order staying the proceedings in Industrial Court Cause No. 195 (N) of 2009 Central Organization of Trade Unions vs Eric Barare Orina, Secretary General of Kenya Union of Journalists and Allied Workers and the resultant ruling made on 29<sup>th</sup> October, 2010.
  
4. That pending the hearing and determination of the substantive petition inter-partes and/or until further orders of this court, the court be pleased to issue a mandatory injunction requiring the 2<sup>nd</sup> respondent to register and recognize the officials of the interested party elected on 7<sup>th</sup> June, 2009, subsequent to returns of the said elections filed with the 2<sup>nd</sup> respondent on 18<sup>th</sup> June 2009 and also subsequent to orders issued on 11<sup>th</sup> June 2010 by the High Court in Civil Case No. 243 of 2010, Paul Rukaria (suing as Chairman –elect) Jane Akinyi (Assistant Secretary-Elect) and Benson Irungu (3<sup>rd</sup> Trustee-elect) vs. Eric Barare Orina.
  
5. That pending the hearing and determination of the substantive petition inter-partes and/or until further orders of this court, the court be pleased to grant the petitioner a conservatory order by way of an order staying the proceedings in Industrial Court Cause No. 195 (N) of 2009 Central Organization of Trade Unions vs Eric Barare Orina Secretary General of Kenya Union of Journalists and Allied Workers and the resultant ruling made on 29<sup>th</sup> October 2010.
  
6. That the court sets an early date for the hearing of the present application inter-partes.
  
7. That the court be pleased to issue further orders and or directions as to the hearing of the present application in light of the peculiar circumstances of the case herein.

**8. That costs of this application be provided for.”**

In the second application, the petitioner sought the following orders:

**“1. That the application filed herein be certified urgent and the same be heard ex-parte in the first instance with respect to prayers 2 and 3 hereof.**

**2. That pending the hearing and determination of this application inter-partes and/or until further orders of this court, the court be pleased to grant the petitioner a conservatory order by way of an order staying the purported registration of a new Secretary General for the Kenya Union of Journalists and Allied Workers in place of the petitioner herein.**

**3. That pending the hearing and determination of the substantive petition inter-partes and/or until further orders of this court, the court be pleased to issue a mandatory injunction restraining the 2<sup>nd</sup> respondent from effecting any changes to the National Officials of the Kenya Union of Journalists and Allied Workers.**

**4. That the court sets an early date for the hearing of the present application inter-partes.**

**5. That costs of this application be provided for”**

In respect of the second application, when it came up for ex parte hearing on 29<sup>th</sup> November, 2010, the court certified it urgent and proceeded to grant interim orders in terms of prayers 2 and 3 thereof. The two applications came up for hearing on 14<sup>th</sup> February, 2011 and the hearing went on upto 28<sup>th</sup> February, 2011.

The application dated 12<sup>th</sup> November, 2010 was supported by an affidavit sworn by the petitioner. He stated that he is the Secretary General of the Kenya Union of Journalists and Allied Workers, which is an affiliate of Federation of Trade Unions known as the Central Organization of Trade Unions – Kenya (COTU (K)), hereinafter referred to as “**COTU**”. He further stated that according to **rules 4, 7 and 8** of the **COTU Constitution**, alongside the Chairman, Vice Chairman and Treasurer of the Kenya Union of Journalists and Allied Workers, are members of COTU Governing Council. The Constitution of COTU has provisions in **rule 4** that enable members of the Governing Council to convene a Governing Council meeting upon failure by the COTU Secretary General to convene such a meeting upon requisition from members of the Governing Council.

The petitioner alleged that together with members of the Governing Council made such a requisition to the Secretary General, COTU on 21<sup>st</sup> April, 2009 but the Secretary General failed to convene the meeting. As a result the Governing Council members who had signed the requisition raised Kshs.2 Million as deposit for the meeting in line with the COTU Constitution as they were concerned that COTU had not reviewed its Constitution to align it with the new Labour Laws. The said members were also concerned by several other shortcomings on the part of some members of the Governing Council, among them being that the Secretary General, Mr. Francis Atwoli and the Treasurer General, Mr. Cornel Nyangun, had been mentioned adversely in a report on corruption at the National Social Security Fund.

The petitioner further stated that on 21<sup>st</sup> April, 2009 he served the Secretary General of COTU with a petition signed by 55% of the members of COTU Governing Council and a cheque for Kshs.2 Million to the Treasurer General, giving a seven days’ notice to convene a Governing Council meeting in

accordance with **rule 4(e) (ii) and (iii)** of the **COTU Constitution**. The service was done by the G4S Courier Services. That notwithstanding, the Secretary General declined to convene the Governing Council meeting.

The petitioner further stated that on 29<sup>th</sup> April, 2009 he was mandated by Governing Council members who had signed the petition to convene the Governing Council meeting in accordance with **rule 4(e)(v)** of the **COTU Constitution**. He therefore proceeded to convene the meeting and caused the meeting to be published in the “Daily Nation” newspaper of 30<sup>th</sup> April, 2009. The meeting was scheduled to be held on 7<sup>th</sup> June, 2009 at Kenyatta International Conference Centre. But on 5<sup>th</sup> May, 2009 the petitioner was served with court papers from M/S J.A. Guserwa Advocates, who had been acting for the petitioner in **Civil Case No. 258 of 2005**. He was surprised to learn that the said advocates had been retained to act against him in **Industrial Court Cause No. 195 (N) of 2009**. The Industrial Court had restrained the petitioner from holding the intended COTU Governing Council meeting. He had also been restrained from interfering with the smooth running and operations of COTU pending hearing and determination of the matter before the Industrial Court.

The petitioner instructed M/S S. Ogeto Ongori Advocates to file a preliminary objection to the said application. Notwithstanding the orders issued by the Industrial Court, members of the COTU Governing Council, including the petitioner, acting on advice received from their legal counsel, proceeded to hold the Governing Council meeting.

The petitioner averred that in the said meeting he was duly elected as the Secretary General of COTU in accordance with the COTU Constitution. On 18<sup>th</sup> June, 2009 the petitioner submitted **Form Q** showing the names of the elected officials of COTU to the Registrar of Trade Unions. The Registrar failed to effect the registration as expected. Earlier, the officials who had been elected had moved to court vide **HCCC No. 243 of 2010**. The suit was filed by Paul Rukaria (Chairman-elect), Jane Akiny (Assistant Secretary-elect) and Benson Irungu (Third Trustee-elect). The petitioner was named as the defendant. Orders were issued by consent in the following terms:

- “1. That a mandatory injunction be and is hereby issued requiring the defendant to draw Form Q and present and/or surrender to the Registrar of Trade Unions for registration and recognition the list of all elected officials. (sic)**
- 2. That the defendant do pay the costs of this application.**
- 3. That the plaintiffs do extract and serve this order upon the Registrar of Trade Unions for immediate compliance.”**

Subsequently, Mr. Atwoli sought to be joined as an interested party in the aforesaid HCCC No. 243 of 2010. On 13<sup>th</sup> October, 2010 the matter was mentioned before Mwera, J. and the aforesaid consent orders were held in abeyance. Subsequently, the matter was referred to the Industrial Court. The petitioner accused the Registrar of Trade Unions of acting in favour of the officials who had been removed from COTU leadership.

On 9<sup>th</sup> December, 2009 the Industrial Court dismissed the preliminary objection that had been raised by the petitioner. The court ordered M/S Guserwa and Company Advocates to amend the application although COTU had not made such a prayer. The amended application was heard and on 29<sup>th</sup> October, 2010, the court barred the petitioner from discharging his duties as Secretary General of COTU. A copy of the court ruling was annexed to the petitioner’s affidavit.

The petitioner made an application for review of the said decision but the application was rejected. The petitioner now states that in the proceedings before the Industrial Court Mr. Atwoli had falsely claimed that the Kenya Union of Journalists and Allied Workers is not an affiliate of COTU which is not so. He further stated that Mr. Atwoli had concealed material facts as he had presented a copy of the COTU Constitution that had been adulterated to conceal **rule 4(e) (v)**. The petitioner further alleged that the judges and members of the Industrial court are appointed upon consultation with the National Labour Board, of which Mr. Atwoli as the Secretary General of COTU, is a member. He also claimed that Mrs. Judith Guserwa is a member of the Rules Board of the Industrial Court. No evidence was brought in support of these allegations.

In respect of the application dated 24<sup>th</sup> November, 2010, the petitioner stated that although he was the duly elected Secretary General of the Kenya Union of Journalists and Allied Workers, he had learnt from the media that he had been ousted from the said position with effect from 22<sup>nd</sup> November, 2010. He annexed to his affidavit an extract from the Registrar of Trade Unions showing the names of the new officials. He alleged that the new officials had not been properly elected since no meeting had been held in accordance with the Constitution of the Union. He added that the Registrar had never contacted him nor sought his opinion regarding the alleged changes as required by **Section 65** of the **Labour Relations Act, 2007**. The petitioner further alleged that the Registrar of Trade Unions and COTU were acting in concert to frustrate his efforts in seeking the leadership of COTU.

The respondents, who were represented by the Attorney-General, did not file any replying affidavit but filed grounds of opposition. The grounds are as follows:

- “1. That the application as filed seems to seek specific orders against the 2<sup>nd</sup> respondent which are different from the orders being sought vide the main petition as filed.**
- 2. That the application is bad in law for want of jurisdiction as it contravenes section 12 of the Labour Institutions Act.**
- 3. That the statement set out in grounds (a) to (i) are not true and are misplaced.**
- 4. That the application is misconceived, bad in law and has material concealment of facts.**
- 5. That the applicant ought to have filed an appeal against the ruling of the Industrial Court.**
- 6. That the entire application as filed herein is frivolous and misconceived as the same has been filed by a person who lacks capacity to file them.**
- 7. That the application herein has been overtaken by events.”**

The interested party filed a replying affidavit sworn by Francis Atwoli, National Secretary General, who stated that he had been mandated by the National Governing Council to swear the affidavit. He stated, *inter alia*, that the petitioner’s application is bad in law for want of jurisdiction in the face of the provisions of **Section 12** of the **Labour Institutions Act** that vests the prerequisite mandate to hear this type of disputes within the domain of the Industrial Court. **Section 12(1)** and **(2)** state as hereunder:

**“12(1) The Industrial Court shall have exclusive jurisdiction to hear, determine and grant any appropriate relief in respect of an application, claim or complaint or infringement of any of the provisions of this Act or any other legislation which extends jurisdiction to the Industrial Court, or**

**in respect of any matter which may arise at common law between an employer and employee in the cause of employment, between an employee or employer's organization and a Trade Union or between a Trade Union, an employer's organization, a federation and a member thereof.**

**(2) An application, claim or complaint may be lodged with the Industrial Court by or against an employee, an employer, a Trade Union, an employer's organization, a federation, the Commissioner for Labour or the Minister."**

Mr. Atwoli further stated that the Kenya Union of Journalists and Allied Workers Union is not an affiliate of COTU and the said union has not been paying the prerequisite affiliate union fees to COTU. He added that the petitioner cannot be an official of COTU Governing Council since the union he purports to present is not an affiliate of COTU. The petitioner had even been restrained from meddling with the affairs of COTU, he stated.

With regard to the petitioner's purported election as Secretary General of COTU, Mr. Atwoli stated that the alleged meeting was held in contempt of the order which had been issued by the Industrial Court and the purported elections conducted thereat had no legal effect.

With respect to the orders granted in HCCC No. 243 of 2010, the interested party deposed that the orders had been obtained through concealment of material facts and misrepresentation by the petitioner and his cohorts and in any event, the order had been stayed. He added that the Registrar of Trade Unions cannot register the changes sought by the petitioner since he had been served with the orders of stay that had been obtained by COTU.

Mr. Atwoli defended the decision made by the Industrial Court, saying that no appeal had been preferred against the same. He added that the issues now being raised by the petitioner against that court and the judges serving thereat are irrelevant and without merit.

Regarding the petitioner's allegation that he had sent some papers through G4S Courier Service, Mr. Atwoli stated that what he received were blank papers. He also denied that a sum of Kshs.2 Million was forwarded to the Treasurer of COTU as alleged by the petitioner.

The interested party urged the court to dismiss the petitioner's application as it was bad in law and lacking in merits.

The petitioner appeared in person while **Mr. Menge, Principal Litigation Counsel**, represented the respondents and **Mrs. Guserwa** appeared for the interested party. Counsel made their respective submissions which I need not reproduce herein.

The first issue that I will deal with is regarding this court's jurisdiction. It has repeatedly been stated that in legal proceedings jurisdiction is everything, without it a court or a quasi-judicial body has to down its tools. The respondents and the interested party referred to **Section 12** of the **Labour Institutions Act**, the relevant portion of which has been cited hereinabove. This suit was brought by the petitioner as the Secretary General of the Kenya Union of Journalists and Allied Workers. The petitioner did not file the petition in his own personal capacity. The substantive prayers sought in the petition are as follows:

**"1. A declaration that sections 11(c); section 7(1) (m); section 7(2) (b); section 17 and section 31(3) of the Labour Institutions Act are unconstitutional, null and void.**

2. **A consequential order quashing the proceedings in Industrial Court Cause 195 (N) of 2009.**
3. **Consequential order compelling the Registrar of Trade Unions to perform his administrative duty by registering and recognizing the officials of the Central Organization of Trade Unions (Kenya) elected in accordance with its Constitution on June 7<sup>th</sup>, 2009.”**

The petition is supported by an affidavit sworn by the petitioner. It is evident that prayer 1 above which seeks to declare certain sections of the Labour Institutions Act as unconstitutional cannot be dealt with by any other court apart from the High Court. **Article 165(3) (d)** of the **Constitution of Kenya, 2010** grants this court jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of whether any law is inconsistent with or in contravention of the Constitution.

As regards the second prayer, **Section 12(6)** of the **Labour Institutions Act** states as follows:

**“Any decision or order by the Industrial Court shall have the same force and effect as a judgment of the High Court and a certificate signed by the Registrar of the Industrial Court shall be conclusive evidence of the existence of such decision or order.”**

The Industrial Court has made certain orders in Industrial Court Cause No. 195 (N) of 2009. No appeal has been preferred against those orders. Those orders were validly made and are conclusive. This court cannot interfere with the same.

The provisions of **Section 12(1)** of the said **Act** are clear that the Industrial Court has exclusive jurisdiction to hear, determine and grant any appropriate relief in respect of an application, claim or complaint or infringement of any of the provisions of the Act or any other legislation which extends jurisdiction to the Industrial Court or in respect of any matter that may arise at common law between:

- (i) an employer and employee in the cause of employment;**
- (ii) an employee or employer’s organization and a trade union;**
- (iii) a trade union, an employer’s organization, a federation and a member thereof.**

The petitioner brought the petition and the applications now under consideration in his capacity as the Secretary General of the Kenya Union of Journalists and Allied Workers, which he said is an affiliate of COTU. He also claimed that he was duly elected as the Secretary General of COTU in a meeting held on 7<sup>th</sup> June, 2009. As a member and official of the Kenya Union of Journalists and Allied Workers, any claim or complaint which may exist between himself and COTU ought therefore to have been filed before the Industrial Court. The petitioner’s case against the Registrar of Trade Unions is due to the alleged failure of the Registrar to register the officials who were elected during the meeting held on 7<sup>th</sup> June, 2009, including election of the petitioner as the Secretary General of COTU. The Industrial Court has exclusive jurisdiction to hear and determine such a dispute. It follows therefore that prayer 3 of the petition cannot be dealt with by this court.

From the foregoing, all the prayers in the two applications which relate to failure by the Registrar of Trade Unions to register and/or recognize the persons who were elected on 7<sup>th</sup> June, 2009 in the aforesaid meeting cannot be dealt with by this court as it lacks jurisdiction to do so.

**Section 12(4)** of the **Labour Institutions Act** empowers the Industrial Court to grant injunctive relief, prohibition, declaratory order, among other reliefs. In essence, if the petitioner had filed the appropriate claim before the Industrial Court, he could have sought all the interlocutory prayers which he is now

seeking before this court pending hearing and determination of the substantive suit in that court. The only part of the petition that can be heard and determined by this court is the prayer seeking to declare various sections of the Labour Institutions Act unconstitutional.

In view of the foregoing, I find and hold that this court has no jurisdiction to grant the prayers sought by the petitioner in the two applications.

But even if I am wrong in so holding, taking into consideration the circumstances under which the meeting of 7<sup>th</sup> June, 2009 was held and the elections held on 30<sup>th</sup> October, 2010 where the petitioner was removed as the Secretary General of the Kenya Union of Journalists and Allied Workers, he lacks *locus standi* to prosecute the petition and/or any application filed thereunder. I say so because the meeting of 7<sup>th</sup> June, 2009 was held in defiance of an order issued by the Industrial Court. None of the officials who were allegedly elected in the said meeting has any legal capacity to come before this court and seek an equitable relief when he is in contempt of court. It matters not whether anyone thought or believed that the said orders were improperly issued. As long as they remained in force they ought to have been obeyed.

In HADKINSON vs HADKINSON [1952] 2 All ER 567, it was held as follows:

**“It was the plain and unqualified obligation of every person against or in respect of, whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt.”**

In the same judgment the court quoted Lord Cottenham, L.C, in CHUCK vs CREMER (1) (1coop.temp cott 342), where he held as follows:

**“A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it...it would be most dangerous to hold that the suitors or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must be obeyed.”**

The order issued by the Industrial Court on 5<sup>th</sup> May, 2009 expressly prohibited the petitioner by himself or through his authorized servants or agents from holding the intended COTU Governing Council meeting on 7<sup>th</sup> June, 2009 or any other date pending hearing and determination of the suit that had been filed by COTU against the petitioner and the union he represented. It is therefore clear that the petitioner and all the people who attended the meeting of 7<sup>th</sup> June, 2009 deliberately chose to violate the aforesaid order. The petitioner, having been elected in such a contemptuous manner, cannot seek to compel the Registrar of Trade Unions to recognize him or any other person elected thereat as an official of COTU.

The orders which were obtained in HCCC 243 of 2010 were as a result of collusion between the plaintiffs therein and the petitioner who was the defendant therein. All the parties failed to disclose to the court that they had been elected in flagrant breach of a court order. The consent orders were subsequently stayed by

the court.

With regard to the application dated 24<sup>th</sup> November, 2010, the petitioner had been removed as the Secretary General of the Kenya Union of Journalists and Allied Workers on 30<sup>th</sup> October, 2010. The Registrar of Trade Unions has registered the names of the new officials. That is evidenced by a letter dated 17<sup>th</sup> November, 2010. The orders sought have therefore been overtaken by events.

For the reasons aforesaid, the petitioner's application is dismissed with costs to the respondents and the interested party.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11<sup>TH</sup> DAY OF MAY, 2011.**

**D. MUSINGA**

**JUDGE**

**In the presence of:**

**Mr. Kabiru – Court Clerk**

**Petitioner – present in person**

**Mr. Menge for the Respondents**

**Miss Rasanga for Mrs. Guserwa for the Interested Party**