REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS) MISCELLANEOUS CIVIL SUIT 68 OF 2009

IN THE MATTER OF AN APPLICATION FOR LEAVE OF MAINA MBUI, DANIEL NDUMBU KYULE AND STEPHEN KANYARI TO APPLY FOR ORDERS OF CERTIORARI PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF THE LABOUR INSTITUTIONS ACT NO. 12 OF 2007

AND

IN THE MATTER OF THE LABOUR RELATIONS ACT NO 14 OF 2007

BETWEEN

MAINA MBUI .... 1ST APPLICANT

DANIEL NDUMBU KYULE .... 2ND APPLICANT

STEPHEN KANYARI .... 3RD APPLICANT

VERSUS

MRS B.W. GACHERU (ACTING AS REGISTRAR

OF TRADE UNIONS) .... 1ST RESPONDENT

J.M. IKIARA (ACTING FOR

REGISTRAR OF TRADE UNIONS) .... 2ND RESPONDENT

WILLIAM K. LANGAT, ACTING AS THE

ASISTANT REGISTRAR OF TRADE UNIONS .... 3RD RESPONDENT

KENYA UNION OF COMMERCIAL

FOOD AND ALLIED WORKERS...........................1ST INTERESTED PARTY

AGAPIO MURIUKI ANTHONY .... 2ND INTERESTED PARTY

BENSON IRUNGU MAINA .... 3RD INTERESTED PARTY

RULING

The application dated 3rd February 2009 seeks to set aside the Order for leave granted on 30th January, 2009. The application seeks to be set aside stay for inter alia the following grounds:-

(i) Being outside the 6 months certiorari period.

(ii) Non disclosure of related suits and that any orders in the current suit would conflict with orders in the past suits and that an affidavit cannot be stayed.

The applicants and the 2nd and 3rd Interested Party have opposed the application on the following grounds among others:-

(i) That the decision makers of the impugned decision had no powers to make the decisions since they have not been appointed as contemplated by s 31 of Labour Institutions Act and that the Minister has never appointed any Registrar as contemplated in the section.

The decision makers therefore made the decisions without jurisdiction.

(ii) They made disclosure of everything they knew and that they were not parties to the suits described in the affidavit sworn in support of the application to set aside the ex-parte order for leave and stay.

(iii) That the decisions made are well within the prescribed 6 months limitation period for certiorari.

I have considered submissions of the learned counsel for each of the parties including the interested parties represented in the suit. At the outset it is clear to the Court that the point raised by the applicant is a point of law as to whether the decision makers had the power to make the decisions they made, at the time they made them.

It is also quote clear to the Court that there is no material non-disclosure as the applicants were not parties to the related suits as described. The law concerning the setting aside of ex-parte order for leave is clearly set out in the following decisions of this Court.

(i) R v Land Registrar Kajiado ex-parte Lilian Muranja Msc Civil Application No. 689 of 2001

(ii) Republic v Social Democratic Party ex-parte Nyangaya Misc Civil Application No. 1133 of 2002.

Suffice it to state that the grounds for setting aside include material non disclosure, misrepresentation and abuse of the court process. The Respondent/Applicants have not shown any such non disclosure, or misrepresentation or abuse of the court process. The issue of the 6 months limitation period is tied together with the issue of whether or not the decision makers had jurisdiction to make the impugned decisions. These are matters better left to the next stage when the Notice of Motion is fully contested on merit. The jurisprudence of the last six years has expanded the scope for certiorari and its ability to quash nullities.

This is one of the many pending suits where the new labour laws are under challenge. In my view no party can suffer greater prejudice where demands of the rule of law are being enforced. One of the important ingredients of the rule of law is certainty of law and this is the core of the substantive application.

Public law courts especially the judicial review courts have a very special role in expanding the space and scope for democracy and constitutionism and should never shy away from this responsibility. To my mind the general duty of fairness or the concept of fairness is by its nature versatile and limitless. It will have to be defined and applied by the courts in each situation as presented now and in the future. Constitutionalism means a limited Government. Public officials such as those challenged in this matter would have to explain why they should exercise power outside the Acts defining their duties. Our law sustains rights and interests and we have in the recent past six years expanded the recognition to legitimate expectations. We do the review as an expression of the will of the people as expressed in legislative and administrative law. However we must extend sufficient deference to policy decisions. On a tentative basis I see no issue of policy in the matter before me.

I dismiss the application but I make no order as to costs because the courts tentative view is that the contest arises from badly drafted laws whose impact cannot bee attributed to any of the contesting parties.

I order that once the substantive notice of motion is filed, served and affidavit in reply filed any party may apply for a mention date so that the hearing may be fasttracked in order to attain the earliest finality possible.

Dated and delivered at Nairobi this 12th day of February, 2009.

J.G. NYAMU

JUDGE