



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 573 of 2002**

**TOM CHARIGA.....PLAINTIFF**

**VERSUS**

**LEONARD RUFUS OCHIENG.....DEFENDANT**

**RULING**

By a plaint herein dated 2<sup>nd</sup> April 2002, Although it has no filing stamp, the interim application accompanying it bears the date stamp of 3<sup>rd</sup> April 2002. The Plaint indicates that the Plaintiff is Tom Chariga (as Secretary General of Kenya Union of Post Primary Teachers (Kuppet). It was brought against Leonard Rufus Ochieng. The salient features of the same are:-

- (1) Vide paragraph 3, the Plaintiff averred that as at the time he had been and remains the registered interim secretary general of Kuppet and the only registered official authorized by the said Kuppet's registered constitution and rules to give notice convening the union's national and or special delegates conference/meetings.
- (2) That by a written notice dated 25<sup>th</sup> February, 2002 the defendant unlawfully, irregularly and in breaches of the unions' constitution and rules purported to convene a special delegates conference of the union to take place in Nairobi at the Umbrella Music Advancing Centre on the 10<sup>th</sup> April 2002 at 9.00 a.m.
- (3) That the proposed conference/meeting remains null and void as the same had been notified without lawful authority of the plaintiff.

In consequence thereof the Plaintiff sought the following orders:-

- (1) The notice convening the Kuppet meeting of 10.4.2002 starting at 9.00 a.m. at Umbrella Music Advancing Centre, Nairobi be and is hereby nullified and the meeting shall not take place.
- (2) Cost of this suit plus interest be met by the defendant.
- (3) Any other reliefs.

The plaint was accompanied by an exparte chamber summons dated 2<sup>nd</sup> April 2002 and filed on 3<sup>rd</sup> April 2002. It was brought under Rules 1, 2 and 3 of the High Court vacation rules and Order 39 rules 1, 2, 3, 4 and 9 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.

The prayers sought were three namely:-

- (1) This application be certified urgent and heard exparte during the Court vacation.
- (2) That the notice convening the meeting of 10.4.2002 at Umbrella Music Advancing Centre at Nairobi be and is hereby nullified and the proposed meeting shall not take place.
- (3) The OCS Kabete Police Station to enforce this order.
- (4) The costs of this application be provided for the Application was supported by an affidavit with annexures.

The said application come before Hayanga J. as he then was on 5.4.2002. The Coram for that date indicates that a Mr. Ogotu who had drawn and filed the Plaint as well as the accompanying chamber summons appeared for the plaintiff. The Respondent L Ochieng was recorded as having appeared in person.

The proceedings of that day read:

*“ Mr. Ogotu: respondent has organized a meeting which the society’s office bearer ought to have called.*

**Mr. Ochieng:** *I have already called off the meeting I am not opposed to the order.*

**Order:** *By consent the prayers 2 and 3 granted as prayed for costs be in the cause.*

*Signed*

*Judge”*

The said order was extracted and issued by the Deputy Registrar on 5<sup>th</sup> April 2002 and the draft copy on the record indicates that the draft had been approved by the defendant.

The court has failed to trace a memo of appearance and defence filed by the defendant. It has also failed to trace the replying affidavit of the defendant in opposition to the said interim application.

From 2002 unless if the contrary is proved, the file went to sleep. On 17<sup>th</sup> July 2007 when Abong B O Advocate filed a notice of change of advocate dated the same date of 17<sup>th</sup> July 2007. The said notice of change of advocate was intended to be served on the firm of: -

- 1) Anyango Ogotu and Co. Advocates 5<sup>th</sup> floor Contrust House, Moi Avenue Nairobi.
- 2) Leonard Rufus Ochieng

P O Box 55636

Nairobi – 00200

On the same date there is a consent letter dated the same 17<sup>th</sup> July 2007 and filed the same date. It is signed by Messers Abong B O as Advocate for the plaintiff and Leonard Rufus Ochieng as the defendant. The contend reads *“Kindly register the consent judgment in respect of this case in the manner*

*agreed by the parties as here under: -*

**By Consent**

**1)** *That the Registrar of trade Unions be and is hereby ordered to register the Notice of Change presented to him by the plaintiff on May 4, 2007.*

**2)** *The suit be and is hereby marked as settled.*

**3)** *Each party to bear their own costs of this suit.*

*Dated at Nairobi this 17<sup>th</sup> day of July, 2007.*

*Signed*

*Abong B O Advocate for the plaintiff*

*Signed.*

*Leornard Rufus Ochieng – defendant.*

The said consent order was given on 18<sup>th</sup> July but extracted and issued on the 23<sup>rd</sup> July 2007.

Next is found on record a notice of appointment of advocates dated 26<sup>th</sup> July, 2007 and filed the same date. It is indicated that the same was to be served upon Mr. Leonard Rufus Ochieng and Abong B. O. Advocate. Along side it, there is a letter by the said Mariara & Company Advocates addressed to the Branch Manager National Bank of Kenya, Kenyatta Avenue Branch concerning an account Number 0102112493300 in the name of Kuppet. In the said notice counsel, described himself as counsel for the interested party. Simultaneous with the said notice of appointment was filed an application under certificate of urgency. It is brought under Order 1 rule 10, order L (rule 1, order XXI rule 22 Civil Procedure Rules, section 3A of the Civil Procedure Act Cap 21 laws of Kenya and all other enabling provisions of law seeking orders that:-

**(a)** This application be certified urgent.

**(b)** The service of this application be dispensed with in the first instance.

**(c)** That there be a stay of execution of the consent order dated 18<sup>th</sup> day of July 2007 pending the hearing and determination of this application.

**(d)** That a status quo be maintained in the interested party Union Bank account Number 0102112493300 at National Bank of Kenya, Kenyatta Avenue till further orders of this counsel.

**(e)** That the honourable court be pleased to admit applicant union interested party herein M/s Kenya Union Post Primary Teachers as a defendant in this suit.

**(f)** That the consent order dated 18<sup>th</sup> July 2007 and subsequent orders thereto be set aside, varied and or vacated.

**(g)** That the officials appointed by the order dated 28<sup>th</sup> day of December, 2006 do continue to run the affairs of the interested party unless, and until court of appeal No. 471 is determined and/or until further the orders.

**(h)** Costs of this application be provided for.

The application is headed Tom Chariga (as secretary general of Kenya Union of Post Primary Teachers (KUPPET) as plaintiff/1<sup>st</sup> respondent. It is against Leonard Rufus Ochieng defendant/2<sup>nd</sup> Respondent and Kenya Union of Post Primary Teachers (Kippet) interested party.

A further perusal of the record reveals that there is an application dated 30<sup>th</sup> day of August 2007 brought under order 39 rules 2A (2) and order 1 rule 1 of the Civil Procedure Rules and section 3 of the Civil Procedure Act laws of Kenya. It is brought by Tom Chariga (as secretary General of Kenya Union of Post Primary Teachers (Kuppet) plaintiff 1<sup>st</sup> applicant and Leonard Rufus Ochieng as the defendant second applicant. It is brought against in the matter of Bernice W. Gachegu the registrar of Trade unions 1<sup>st</sup> Respondent, and in the matter of Lucy Ndungu Deputy Registrar of Trade unions 2<sup>nd</sup> Respondent. The prayers sought are: -

- 1) The applicants application annexed here to be heard urgently owing to the urgency of the matter.
- 2) That an order for committal to prison be made against the Bernice Gachegu, Respondent herein for such a period as the Honourable Court may deem fit and just for contempt of court in that he disobeyed the orders issued on July 23, 2007 requiring him to register the “form N” dated April 27,2007 and update the list of the officials of the union.,
- 3) That the Respondent be compelled to comply with the said court order.
- 4) That the costs of this application be provided for.
- 5) That such other and or further relief be granted, as this Honourable court may deem fit and just to grant in the circumstances of this matter.

This application too is still pending. On 9<sup>th</sup> October another consent dated 9<sup>th</sup> October and filed the same 9<sup>th</sup> October was filed. The heading shows that the same is between Tom Chariga (as Secretary General of Kenya Union of Post Primary Teachers (Kuppet) as the plaintiff and Leonard Rufus Ochieng defendant. it reads: -

“Kindly enter consent in the following terms: -

- 1) *The consent order issued on July 23, 2007 be set aside.*
- 2) *The registrar of Trade Unions be and is hereby ordered to register the “Form N” dated October 3, 2007 bearing the following names.*
  - (i) *Leonard Rufus Ochieng –National Chairman*
  - (ii) *Fred Mukabi – 1<sup>st</sup> National Vice Chairman*
  - (iii) *Richard Tonui – 2<sup>nd</sup> National Vice Chairman*
  - (iv) *Tom Chariga – Secretary General*
  - (v) *Ignatius Njeru Kanyamba – Deputy Secretary*
  - (vi) *Benta Akinyi Opande – Assistant Secretary General*
  - (vii) *Samuel Lewis J Nyakweba – National Treasurer*
  - (viii) *James Muhia Njuguna – Assistant National Treasurer*

(ix) *Almada Osije Majina – 1<sup>st</sup> National Trustee*

(x) *Stephen Kimwele – 2nd National trustee*

(xi) *Johnson M. Waithaka – 3<sup>rd</sup> National trustee*

(xii) *Kepher L Oguwi – 4<sup>th</sup> national trustee.*

3) *Costs be met by each party*

*Signed*

*Abong B O Advocate – for the plaintiff*

*Signed*

*Leonard Rufus Ochieng – defendant*

*Filed in the High Court at Nairobi this 9<sup>th</sup> day of October 2007. Drawn and filed by Abong B O Advocate etc”*

The said consent was endorsed by the Deputy Registrar on 16<sup>th</sup> October 2007. On 28<sup>th</sup> November 2008, Nyabena Nyakundi and Co. Advocates came on record for the defendant.

On 8<sup>th</sup> February 2008, the said Nyabena Nyakundi for the defendant filed a preliminary objection on the ground that the purported interested party’s application dated 26<sup>th</sup> July 2007 and 23<sup>rd</sup> October 2007 are incompetent and should be struck out with costs. The said preliminary objection is the subject of this ruling.

The main grounds against it are that: -

- 1) That the notice of appointment of advocate was not served on any body and so the counsel who presented those two applications has no audience before court.
- 2) The application seeks substantive orders before the interested party who is seeking them has been properly enjoined into these proceedings.
- 3) There is nothing to show that the party seeking to come into these proceedings is in fact the secretary general of Kuppet.
- 4) The said applicant has not annexed any authority authorizing him to make the said application.

Counsel for the plaintiff also objected to the said application on the ground that there is no jurisdiction to join a party to the proceedings as an interested party.

(ii) No reason has been given as to why he wants to be joined to the proceedings.

In response, counsel for the intended interested party opposed the preliminary objection on the grounds that: -

- 1) They have appeared severally in court on behalf of the union without any objection from the other counsels,
- 2) They have sought stay because the suit is between individuals who have recorded a consent to take over the running of the union and so they wanted to arrest the orders affecting the union.

- 3) The proceedings offend the provision of section 27 of Cap 233, the Trade Unions Act, which mandates that the unions should sue and be sued in its own name.
- 4) What the objector has presented to court are points of facts, which require to be disproved, and not points of law.
- 5) They contend that a lot has taken place in the union since 2007, which go to show that Tom Chariga is not a representative of the union.
- 6) That the union has been sought to be brought into these proceedings in order to protect the interests of the union. Its presence has not, therefore, prejudiced the other parties in any way.

In response the counsel for the objector still maintained that counsel for the intended interested party has not answered their allegation that the notice of appointment was not served on to the other parties herein as required by law.

- (2) They also contend that the said interested party has not answered their assertion that they were required to apply to be joined to the proceedings first before moving to seek substantive orders.
- (3) They also maintain that Misc. application 635/07 in which the intended interested parties have already been joined as parties has no relevance to these proceedings.

On the courts assessment of the facts herein it is clear from the arguments of all the parties to the preliminary objection that the questions that this court has been called upon to answer are as follows: -

- (1) Whether the preliminary objection satisfies the Ingredients of a preliminary objection in order for it to be sustained.
- (2) Whether the notice of appointment of the intended interested party has been faulted and as such it renders their presence in these proceedings invalid due to lack of locus standi on that account.
- (3) Whether the said intended interested party should have sought to be joined to these proceedings first and only after such joinder being effected is when they could present an application seeking substantive orders.
- (4) Whether on the facts displayed on the record herein the defendant has locus standi in this matter firstly and secondly whether he has locus standi to present the said preliminary objection.
- (5) What is the status of the entire proceedings herein. In view of the facts displayed on record.

As regards the required ingredients for sustaining a preliminary objection, the law is now crystal clear. The same have been settled by case law. The land mark decision in the case of **MISKISA BISCUIT CO. LTD VERSUS WEST END DISTRIBUTERS LTD (1969) EA 696** is an authority and has been approved in numerous other decisions subsequently IN IT. At page 700 letter D law JA as he then was had this to say “*a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of the a pleadings and which if argued as a preliminary point may dispose of the suit*” In the same authority Sir Charles Newbold P (as he then was) at page 701, letter B had this to say “*A preliminary objection is in the nature of what is or used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or of what is sought is the exercise of judicial discretion*”. As mentioned this principle has been approved, followed and applied in numerous authorities both by the superior court and the court of appeal (see the case of **NJOYA AND OTHERS VERSUS ATTORNEY GENERAL & ANOTHER (2004) IKLR 232**)

In view of the foregoing principles all that this court has to satisfy itself in order to sustain the preliminary objection raised is to make findings that the applicant has demonstrated: -

- (1) That the preliminary objection is purely on a point of law.
- (2) That the facts pleaded by the other side are not in dispute.
- (3) That the objector is not seeking the courts discretion on the matter.

Applying these ingredients to the preliminary objection, the court makes findings that: -

(a) There is no dispute that what is disputed is the lack of service of the notice of appointment by the intended interested party and the inclusion of both prayers to be joined to the proceedings as well as the substantive prayers on the application objected to. This court has no doubt that issues of service of a notice of appointment and joinder of a party to the proceedings as well as relief's sought are issues of law. Though they may require facts to be sifted in order to establish or dispose them. What the preliminary objection requires is just for the court to look at the pleadings. The court has before it the record and the notice of the appointment as well as the application objected to and submissions of counsel on record. No further inquiry is required. What is left is for the court to marry these to the relevant provisions of law. Order III rule 7 civil procedure rules dealing with recognized agents and advocates requires that notice of appointment be filed in court and be served on every party to the cause. As submitted by the objector's counsel there is no Return of Service by the intended interested party to show that the said notice of appointment was served on the parties to the cause. Counsel on record for the said intended interested party was non-committal as he never addressed it in his submissions.

As for the twinning up of the prayer for joining and substantive prayers is one application, the application objected to speaks for itself. The court finds that they are so joined together. The court agrees with the counsel for the objector that leave to join (should have been sought first, and after such joinder is accorded, and locus standi, acquired, and is when presentation of substantive prayers would follow. The objection is, therefore, valid. The court is also satisfied that the facts pleaded by the other side are not in dispute as the notice speaks for itself, as there is no return of service on record evidencing service, where as the reliefs in the application objected to plainly show that the prayer to be joined is twinned up with the substantive prayers.

Lastly the court is satisfied that what is sought is not the discretion of the court as what the objector is asking for is not to determine whether to strike them out or not but to strike them out on the basis of invalidity mentioned.

The ingredients for the preliminary objection have been established subject to establishment of proof of locus standi to present the same. The assessment above answers questions 1, 2 and 3 above. Regarding the locus standi of the defendant Leonard Rufus Ochieng, it is on record that he was sued as a defendant herein.

According to law and the civil procedure rules, a defendant has two avenues to gain locus standi (1) through entry of appearance after service upon him of summons to enter appearance together with the plaintiff. There is no summons to enter appearance, which have ever been taken out in this matter. None have ever been served. Hence no appearance has ever been entered herein.

Another avenue should have been through order 50 rule 16 civil procedure rules, by filing a replying affidavit or grounds of opposition to the interim application, which had accompanied the plaintiff. The record reveals that no such replying affidavit or grounds of opposition was ever filed to that interim application. It is on record that the said interim application was compromised by a consent. Upon such compromise the defendant lost locus standi through that avenue. It therefore follows that anything done with the participation of the said defendant after the consent orders of 5<sup>th</sup> April 2002 has no legal standing and the same is null and void. This finding faults not only the defendant's participation in the consent dated and filed on 17<sup>th</sup> May 2007 as well as the one dated and filed on 9<sup>th</sup> October 2007; plus any other processes that the defendant has participated in bringing on record in the form of correspondences, affidavits or applications of whatever nature and howsoever presented.

The last point to be dealt with is the status of the entire proceedings. Although this did not form part of the arguments between the parties, this court has inherent jurisdiction conferred upon it by section 3A of the civil procedure act to do all that is necessary for ends of justice to be met and to prevent abuse of the due process of the law. The section reads:-

*“Nothing in this act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the due process of the court”.*

This inherent power can be invoked formally by the parties or suo moto by the court. This court has invoked it suo moto after going through the record and considered it in line with the preliminary objections. The defendant having questioned the locus standi of the intended interested party, it was only proper for the court to move and determine whether he too is properly clothed with locus standi as well as other stake holders in the proceedings.

The court has gone over the entire record and as set out in the background information to this ruling, and considered the same in line with the general principles of law applicable, and the court makes the following general findings concerning the entire proceedings.

This is necessary to provide guidelines on the way forward so that the matter is brought to an end as well as prevent hardships and injustice to the parties.

**(1)** The plaint presented to this court dated 2<sup>nd</sup> April 2002 and filed on 3<sup>rd</sup> April 2002 had one major prayer namely prayer 1. Its purposes was to nullify the notice convening kuppet meeting that had been scheduled to be held on 10.4.2002 and to prevent it from taking place. The plaint also sought costs and other reliefs. Prayer 1 of the plaint also formed the main prayer on the interim application. It follows that once the interim application was compromised on 5.4.02 and the date of 10.4.02 came to pass, that prayer became spent.

**(2)** Prayer 1 having become spent the plaintiffs’ suit could only survive under any other relief. This court had occasion to revisit this nature of relief in its ruling delivered on 23<sup>rd</sup> day of March 2007. At page 19 of the said ruling at line 10 from the bottom last paragraph, the court observed thus *“guidance on what should and should not form part of the claim such further and other relief as the court may deem fit to grant”* Is in the case of **REX HOTEL LTD VERSUS JUBILEE INSURANCE CO. LTD [1972] EA 211**. The facts of the case are set out in the last paragraph on page 19 through to 2<sup>nd</sup> paragraph on page 20 at line 8 from the bottom on page 20. The court set out the holding thus *“on appeal it was held inter alia that “The orders for possession and mesne profits should not have been made:-*

**(a)** *Because these could not have been claimed when the suit was filed, and*

**(b)** *Because such relief was not consequential upon the declaration that the promises were not controlled and that the respondent would be entitled to possession on expiry of the lease.”*

At page 21 line one from the top, the court, observed *“it is clear that in order to fault prayer 2 (c) (it was a prayer for such further and other relief as the court may deem fit to grant) of the application for summary judgement, it has to be shown that, that relief was in capable of being claimed at the time the counter claim was filed and secondly it is not consequential to the main relief in the counter claim. Applying that construction to the said further relief in the plaint herein, after prayer 1 was spent as shown, any other relief survived only for the reliefs that could have been claimed as coming from the notice given for the said meeting and the said meeting of 10.4.02 and anything consequential thereto. Anything outside that is not covered.*

**(3)** The notice of change of advocate dated 17<sup>th</sup> July 2007 and filed the same date by Abongo B. O. Advocate is invalid for non compliant with the provisions of Order III Rule 7 Civil Procedure Rules. It reads *“The party giving the notice shall serve on every other party to the cause or matter (not being a party in default as to entry of appearance, and on the former advocate a copy of the notice endorsed with*

*a memorandum stating that the notice has been duly filed in the appropriate court (naming it).*

Although proof of service of the said notice on the defendant can be proved by the defendants' endorsement of the signature on the purported consent service on the out going advocate has not been exhibited by a return of service duly filed or a consent secured from the said advocate that there is no objection.

Failure to so comply means that Messers Anyango Ogutu & Co. Advocates are still the proper counsels on record for the plaintiff in terms of Order III Rules 11, 12 of the Civil Procedure Rules. It therefore follows that all that has been undertaken by Abong B. O. Advocates in this matter is null and void.

**(4)** Since no summons to enter appearance were taken out and served on the defendant and the interim application having been spent before the defendant put in any papers in opposition, the default robbed him of locus standi in this matter. On this account the defendant was in capable of entering into a consent compromising a suit to which he had not been properly invited to participate in likewise since Abong B.O. Advocate had not properly put himself on record in the place of Anyango Ogutu Advocate, he was in capable of compromising the suit in his capacity as agent. It means that signing and filing of the consent was an exercise in futility and the same is null and void.

Having faulted the signatories to the consent filed on 17.07.2007 it follows that anything done in pursuance to the same is null and void and if no consequence inclusive of the Deputy Registrar's endorsement of the said Order on 18.7.2007

**(5)** The notice of appointment of the intended interest party was supposed to be served on all parties properly and rightly participating in the proceedings. The only rightfully and proper party participating in the proceedings proceedings herein is the plaintiff whose proper advocate who is still on record is Anyango Ogutu & Co. Advocates. This is the only counsel with a right to complain. He has not complained. The complaint of Messers Abong B.O. and Nyabera Nyakundi hold no water as they are not properly on record.

**(6)** Prayer C, D, F and G of the intended partys' application dated 26.7.07 which is objected to are invalid, in that they are substantive in nature and could only be prayed for by a party who already had locus standi in the matter.

**(7)** Prayer E was the only prayer that could have been properly presented by the intended party after the notice of appointment had been properly served. Its merits would only have failed or succeeded depending on whether the same could fit in the surviving relief of such other relief in the plaint.

**(8)** The twining up of prayer E for joinder with the substantive prayers for other reliefs would not of itself have faulted the entire application as the court has jurisdiction and the power to strike out the invalid prayers and leave the valid prayer to be dealt with on merit.

**(9)** Following on the findings in number 7 and 8 above any other processes filed by counsel of the intended interested party are null and void.

**(10)** The plaintiffs attempt to initiate contempt of court proceedings against parties who allegedly disobeyed the consent orders of 17.7.07 are in valid because the said consent orders have been faulted and secondly the initiating counsel is also not properly on record.

**(11)** The consent letter dated 9<sup>th</sup> October 2007 and filed the same date is also faulted because firstly it is signed by Abong BO.O Advocate for the plaintiff whom this court has ruled that is not properly on record. Secondly it is signed by the defendant Leonard Rufus Ochieng whom this court was ruled that he has no locus standi as he has never served with summons to enter appearance, never entered appearance or filed defence. Thirdly it purports to benefit parties who are not parties to these proceedings and who were not envisaged by the relief sought herein. Fourthly the beneficiaries of the consent with the exception of the plaintiff and defendant who are total strongers if not busy bodies herein.

**(12)** The preliminary objection filed by the defendant despite it being based on sound basis as stated earlier in this ruling, has been found invalid on the ground that the defendant presenting it has no locus standi by reason that he was or over served with summons never appearance, and he never entered appearance.

The net result of the foregoing assessment is that the proceedings herein as demonstrated above on what has transpired herein is a scenario that portrays a proper candidate for the wielding of the axe in Section 3A. Failure to serve summons to enter appearance, on the part of the plaintiff and the defendants' failure to complain about the plaintiffs' failure to regularize the proceedings so that he is properly brought on board in order to effectively participate in the proceedings so as to have the matter concluded as well as their going ahead to obtain substantive orders using the incomplete proceedings, irregularly is nothing but evidence of flagrant abuse of the due process of the court. It is the duty of this court to put such conduct to an end and restore the dignity of the due process of court by reminding the litigants herein that the court process is for serious business and not for a hide and seek game for juveniles.

Ends of justice herein demands that the suit as well as what has taken place herein irregularly as outlined above stands dismissed.

**(2)** Since all participants have soiled their hands in the irregularities outlined above in one way or the other all will pay own cots.

**DATED, READ AND DELIVERED AT NARIOBI THIS 25<sup>th</sup> DAY OF APRIL, 2008.**

**R. N. NAMBUYE**

**JUDGE**