



**REPUBLIC OF KENYA**

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

**Civil Case 1723 of 2002**

**JACK APOLLO .....1<sup>ST</sup> PLAINTIFF/RESPONDENT**  
**JOHN RONO .....2<sup>ND</sup> PLAINTIFF/RESPONDENT**  
**ALBERT LOLE.....3<sup>RD</sup> PLAINTIFF/RESPONDENT**

**Versus**

**CALEB ODUOR OLUM.....1<sup>ST</sup> INTENDED PLAINTIFF**  
**MARTHA MKABALI..... 2<sup>ND</sup> INTENDED PLAINTIFF**  
**JOANES OWINO OKOTCH.....3<sup>RD</sup> INTENDED PLAINTIFF**  
**SAMUEL MUSEE MUNGUTI..... 4<sup>TH</sup> INTENDED PLAINTIFF**  
**PATRICK SHIKUKU KARANGANI .....5<sup>TH</sup> INTENDED PLAINTIFF**  
**ELIJAH MUSEMBEI..... 6<sup>TH</sup> INTENDED PLAINTIFF**  
**SIMON ISILUTI..... 7<sup>H</sup> INTENDED PLAINTIFF**  
**WILLIAM OPONDO..... 8<sup>TH</sup> INTENDED PLAINTIFF**  
**ALFRED NYONGESA..... 9<sup>TH</sup> INTENDED PLAINTIFF**  
**PATRICK KARANJA..... 10<sup>TH</sup> INTENDED PLAINTIFF**  
**BENSON KIUNGA .....11<sup>TH</sup> INTENDED PLAINTIFF**  
**FRED M. ONDARI ..... 12<sup>TH</sup> INTENDED PLAINTIFF**  
**JOSEPHAT A. LWENYA..... 13<sup>TH</sup> INTENDED PLAINTIFF**  
**LEWIS MUGIRA KIUNGA..... 14<sup>TH</sup> INTENDED PLAINTIFF**  
**FREDRICK MUIRURI .....15<sup>TH</sup> INTENDED PLAINTIFF**

JOHN MBUGUA .....16<sup>TH</sup> INTENDED PLAINTIFF  
THOMAS MWAMBIRE..... 17<sup>TH</sup> INTENDED PLAINTIFF  
SIMON KINYANJUI ..... 18<sup>TH</sup> INTENDED PLAINTIFF  
WYCLIFFE SAVA..... 19<sup>TH</sup> INTENDED PLAINTIFF  
JEREMIAH OUMA .....20<sup>TH</sup> INTENDED PLAINTIFF

VERSUS

JARED AKAMA ONYARI.....DEFENDANT/RESPONDENT

### R U L I N G

1. The application before court is the Notice of Motion dated November 20, 2007 which seeks leave of this Honourable Court to enjoin the 1<sup>st</sup> – 20<sup>th</sup> intended plaintiffs in this suit. The grounds in support of the application are that:-

- (a) *THAT JARED AKAMA ONYARI, JACK APOLLO and JOHN RONO all who are not members of the Kenya Hotels and Allied Workers' Union have unlawfully obtained orders to change the officials of the Trade Union. The Applicants are directly affected by the orders obtained and are interested in protecting the legitimacy and integrity of the Union.*
- (b) *Orders were issued affecting the Union without the Union being aware.*
- (c) *Disclosure was not made of the fact that ALBERT LOLE is deceased.*
- (d) *Disclosure was not made of the fact that the Union has carried out elections several times since the filing of the case and the duly elected officials have been filing their returns with the Registrar of Trade Unions.*
- (e) *The parties never disclosed that there has been litigation before on the issue of leadership of the party, which the said JARED AKAMA ONYARI, JACK APOLLO and JOHN RONO lost.*
- (f) *That the consent order is therefore fraudulent and should be set aside.*
- (g) *That unless this application is granted, the affairs of the Union will be thrown into disarray and frustrate the members who have duly elected officials.*
- (h) *That a number of the persons listed as officials of the Union, including JARED AKAMA ONYARI have been convicted of a criminal offence involving moral turpitude, and he and the other convicts are disqualified by law (The Trade Unions Act, section 29(2) from holding office in a trade union.*

2. The application is also supported by the sworn affidavit of Joanes Okotch dated November 20, 2007. He says that he is the legitimate Secretary General of the Kenya Hotels and Allied Workers Union, (the Union) a post to which he says he was elected on March 26, 2006. Annexure marked "JOA" to the affidavit is a letter from the Returning Officer dated March 27, 2006 confirming the deponents and other officials' election into office. The deponent says he is a stranger to the consent order recorded in court on October 5, 2007 by which the plaintiffs herein and the Defendant were shown as the new office bearers of the Union. He also contends that the said consent order of October 5, 2007 which order was issued on October 19, 2007 was made without the consent of the duly elected officials of whom he was one. In his view the said consent order was obtained by fraud for the following reasons:-

- (a) It was not disclosed to the court that ALBERT LOLE, the third plaintiff, died way back in the year 2002. No substitution has been done.
- (b) JACK APOLLO and JOHN RONO are no longer officials or members of the Union. There is a court order barring JACK APOLLO and his agents from purporting to act as officials of the Union. A copy is annexed and marked JO3.
- (c) Both of them have not been officials since 26<sup>th</sup> March 2006 when new officials were elected.
- (d) E.N. NGANGA and Company advocates are not the lawyers of the Union. The Union had passed resolutions authorizing the firm of ENONDA, MAKOLOO, MAKORI & CO. ADVOCATES to be its lawyers exclusively. Annexed hereto and marked JO 3A are the minutes to this effect.
- (e) That this case was actually overtaken by events since elections have been held since 2002, in particular on 26<sup>th</sup> March 2006 following a circular from the Registrar of Trade Unions. The legitimate list of National officials is annexed and marked JO3B.
- (f) That the prayers sought in the Plaint was to restrain the Defendant from interfering in the operation of the Union hence, the consent order issued on 19<sup>th</sup> October 2007, replacing leadership of the Union is null and void.
- (g) In respect of the persons listed as new officials in the consent order, I wish to say as follows:
- I. JANE AKINYI is not a member of the Union, having been dismissed for misconduct. She has never paid any subscriptions.
- II. JAMES TIALA, BEN ODUOR AND ALFRED MUYE are not members of the Union.
- III. JOHN KIBOMA, JAPHET KWENGA, FREDRICK NDUMA, JANE ONDEYO, SAMUEL OBARE, FREDRICK WAGUNDA and JOHN WANYAMA had purported to conduct elections that were nullified by the Registrar. A copy of their purported returns is annexed and marked JO4.
- IV. A copy of the letter from the Registrar rejecting their returns is annexed and marked JO5.
- V. These persons are facing forgery allegations. A copy of a letter from the police is annexed and marked JO6.
- VI. THAT we had also filed Civil Case Number 594 of 2007 in this court against them, to stop them from their illegal activities and the case is still pending. A copy of the amended plaint is annexed and marked JO7.

and that if the correct information had been given to the court, and if the duly authorized firm of lawyers, that is to say the firm of **Enonda, Makoloo, Makori & Co. Advocates** had appeared in the matter, there is no way that the court could have granted the consent orders of October 5, 2007. These are the reasons why the applicants want to get into the matter so as to put the record straight. The deponent also says that the intended plaintiffs have an interest in the matter as duly elected officials of the Union.

3. The application was opposed on the following grounds which had been raised by way of Preliminary Objection but which formed part of the respondents' arguments during the hearing. That is to say:-

- (1) **That the suit herein was settled on 5<sup>th</sup> October 2007 and there is no pending suit herein capable of the Applicants being enjoined under Order 1 rule 10 of the Civil Procedure Rule.**
- (2) **That the application offends the sub judice rule under section 6 of the Civil Procedure Act in that there is another suit being CMCC No.9954 of 2007 at Milimani Commercial Court.**

**(3) That the Applicants are guilty of concealment of material facts, not candid and have misrepresented facts with the sole intention of deceiving this court and should not be heard further.**

**(4) That the Notice of Motion dated 20<sup>th</sup> November 2007 should be expunged from the court records, with costs to the Respondents.**

4. The respondents also relied on the Replying Affidavit sworn by **John Rono**, the 2<sup>nd</sup> plaintiff in which he says that there is no live suit to which the applicants herein can become parties because, according to him, the suit was settled vide the consent order dated October 5, 2007 and further that the applicants' attempt to be enjoined in the suit was dismissed on November 22, 2007. The genesis of the consent order of October 5, 2007 was the consent letter of the same date filed by the parties advocates, namely M/s E.N. Ng'ang'a & Co. Advocates for the Plaintiff and M/s Jared Akama Onyari for the Defendant. The consent was to the effect that the suit by the plaintiffs against the defendants was to be marked as settled in the following terms:-

**a. The following persons be appointed as National Officers of the Kenya Hotel and Allied Workers Union.**

**NATIONAL EXECUTIVE BOARD**

- 1. Fredrick Nduma - National Chairman**
- 2. Fredrick Wagunda - Vice Chairman**
- 3. Jared A. Onyari - Secretary General**
- 4. Jack Apollo Ouko - Deputy Secretary General**
- 5. David Kiboma - National Treasurer**
- 6. Japhet Kwenga - Assistant Treasurer**
- 7. John Wanyama - Organizing Secretary**
- 8. Benjamin Manka - Assistant Organizing Secretary**

**NATIONAL TRUSTEES**

- 9. Samuel Obare Obara -**
- 10. Lawrence Ontita**
- 11. Jane Akinyi**

**EXECUTIVE BOARD MEMBERS**

- 12. Collins Otieno**
- 13. Peter Nyambeki Ndege**
- 14. Jared Kauka Mwangi**
- 15. James Tialala**
- 16. Zipporah M. Syombua**

17. *Lawrence Otieno*
18. *Joseph Kirionki*
19. *Hezron Mandere*
20. *Susan Wanja*
21. *Stephen Juma*
22. *Geoffrey Areri*
23. *Senteu Ole Mokombo*
24. *Ben Oduor*
25. *John Onyango*
26. *Dominic Mbijiwe*
27. *Mercy Wangare*
28. *Alfred Muye*
29. *Joseph Kamonde*

**b. THAT the Registrar of Trade Unions be served with this order and ensure compliance forthwith.**

**c. Each party to bear its own costs.**

5. Mr. Rono contended further that the applicants have also filed Chief Magistrate's Court Civil Case No.9954 of 2007 at Milimani Commercial Courts and that there are injunctive orders against the plaintiffs herein. The interim order against the Union, issued on November 13, 2007 and the same were to remain in force until hearing of the application interpartes on November 27, 2007; and that the issues in that suit are the same as those in the instant suit and that accordingly, this suit is subjudice. Mr. Rono accused the applicants of material non-disclosure and that as such the court should not exercise its discretion in their favour.

6. At the hearing hereof, Mr. Enonda appeared for the applicants while Mr. Mariaria appeared for the Defendant and also held Mr. Ng'ang'a's brief for the 1<sup>st</sup> plaintiff. Mr. Mbugua appeared for the 2<sup>nd</sup> plaintiff. The 3<sup>rd</sup> defendant was reported deceased.

7. Mr. Enonda contended that the applicants ought to be enjoined as parties to this suit so as to enable the court to get to the root of the issues in dispute and further that the consent order of October 5, 2007 should not and cannot be used to oust the jurisdiction of this court to hear the parties fully on the issues before it. Mr. Enonda referred the court to the following authorities:-

- Nrb HCCC No.1062 of 2005(2)

John Ward vs Standard Limited

- Nrb HCCC Misc Application No. 186 of 2007

**Kenya Anti-Corruption Commission –vs- Judith Marilyn Okungu & 2 Others (2007)e KLR**

8. At page 8 of the **Kenya Anti-Corruption Commission case**, the learned Judge (Visram J) quoted with approval from **Interpretation of Statutes** by Maxwell, 12<sup>th</sup> Edition, at page 137 where the learned authors said,

***“On the other hand, there is no doubt that the office of the judge is to make such construction as will suppress the mischief and advance the remedy, and to suppress all evasions for the continuance of the mischief. To carry out effectively, it must be so construed as to defeat all attempts to do, or avoid doing, in an indirect, or circuitous manner that it has prohibited or enjoined.”***

9. It would seem to me that in this case, Mr. Enonda is saying that the respondents should not be allowed to continue in their mischief of irregularly installing themselves as officials of the Union in order to defeat the course of justice. He also contended that no party will suffer any prejudice if the orders sought are granted, and that if any prejudice arises, it would be adequately compensated in costs.

10. Mr. Mariaria for the Defendant and also on behalf of Mr. Ng’ang’a for the 1<sup>st</sup> Plaintiff said that the applicant’s application must fail for reasons that the affidavit in support does not meet the requirements of Order 1 Rule 12 of the Civil Procedure Rules which requires that authority to act on behalf of others must be in writing, filed in the same cause and served on all parties concerned. With respect to Mr. Mariaria, all that the rule requires is that the authority shall be in writing, signed by the party giving it and shall be filed in the cause. There is no requirement for service of such authority upon other parties, although it may be prudent to do so. The authority in this case is filed in the cause.

11. Mr. Mariaria further argued that if the court found that the application is properly before court, the court should find that the suit is already concluded since there is a judgment in terms of the consent order of October 5, 2007, and therefore that the instant application is an abuse of the court process. Mr. Mariaria distinguished the authorities cited by the applicants by saying that in those authorities there was no judgment on record. He pointed out that the ruling in the **John Ward** case was made to allow issues pending for determination by the court to be addressed, unlike in the present case where he says there are no pending issues. In any event, Mr. Mariaria argued the applicants will suffer no prejudice since they can ventilate their case under HCCC No. 2 of 2008. Earlier, Mr. Mariaria told the court that there was need to deal with the two files together. In HCCC No. 2 of 2008, the defendant is the same as in the instant suit, but out of the twenty intended plaintiffs, only the following appear in **suit No. 2 of 2008: Patrick Shikuku Karangani, Alfred Nyongesa, Patrick Karanja, Lewis Mugira Kiunda and Fredrick Muiruri.**

12. In his submissions on behalf of the 2<sup>nd</sup> plaintiff/respondent, Mr. Mbugua concurred with Mr. Mariaria and urged the court to find that there are no proceedings to which the applicants could be enjoined as plaintiffs. He said that if the suit is re-opened the 2<sup>nd</sup> plaintiff is likely to suffer undue delay and unnecessary costs. He also argued that the applicants have not demonstrated why they should be enjoined in the suit. In particular, he contended that the applicants had not complied with Order 1 of the Civil Procedure Rules which provides that a party can be enjoined to a suit if such party has an interest in the relief sought. He pointed out that the applicants have not even annexed a draft amended plaint to show what relationship exists between themselves and the reliefs they seek. Mr. Mbugua also said that for the applicants to succeed, they must show that they are somewhat related with the original suit.

13. In reply, Mr. Enonda submitted that there is no legal bar against a party being enjoined in a compromised suit. He also said that the applicants have clearly shown that they are adversely affected by the consent orders of October 5, 2007, since they lay a claim to various offices of the Union.

14. I have now considered the pleadings and the submissions made before me in this matter. I have also considered the authorities cited to me by counsel and my finding is that this suit, suit No. 2 of 2008 and CMCC No. 9954 of 2007 are so intertwined that the issues arising in all the matters ought to be decided with all parties on board. Though the respondents have contended that the applicants have not demonstrated what interest they have in this suit, it is my view that all the applicants have an interest in the suit either as ousted Union officials or members. In fact the history of this case is such that it would be prejudicial to the applicants if they are excluded from these proceedings. I am in agreement with Mr.

Enonda for the applicants that there is no legal bar against the applicants being enjoined in this suit even at the present stage, for Order 1 Rule 10(1) of the Civil Procedure Rules provides:-

***“10(1) where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit (emphasis mine).***

15. So, the two factors to be considered by the court are (a) bona fides mistake and (b) the necessity for proper determination of the real matter in dispute. It is my view that the real matter in dispute in this case is the leadership of the Union. There are claims and counter claims as to who the genuine leaders of the Union are and the court cannot possibly determine those issues unless all parties who claim a stake in the case on board. Further, I do find and hold that there is a degree of mischief in this whole saga in the manner the officials of the Union have either been removed and or brought on board. It is the duty of this court to ensure that the mischief is not perpetrated to the detriment of some stakeholders. I am persuaded that section 3A of the Civil Procedure Act clothes this court with sufficient discretion to make the orders sought by the applicants herein. I am also of the view that no prejudice will be suffered by any of the respondents by this order. If anything, I believe that bringing the applicants on board in this suit will clear the apparent mystery surrounding the elections that led to the current stalemate in the Union, and also clear the air about the consent order dated October 5, 2007.

16. In the result, I do find and hold that the applicants’ application has merit. I accordingly allow the same in terms of prayer number 2 of the application dated November 20, 2007. As for costs, I order that each party shall bear its own costs.

17. Orders accordingly.

**Dated and delivered at Nairobi this 18<sup>th</sup> day of July 2008.**

**R.N. SITATI**

**JUDGE**

Delivered in the presence of:-