



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Civil Case 85 of 2006

1. KENNEDY N. LUBANGA
2. NICHOLAS OMAMO WALUNYA
3. MUTALII KHAEMBA

4. ALPHONCE ACHIENO.....PLAINTIFFS

V E R S U S

GENERAL SECRETARY KENYA UNION OF SUGAR

PLANTATION

and ALLIED WORKERS (KUSPW) DEFENDANT

R U L I N G

The suit herein was commenced by plaint by Messrs *Kennedy Lubanga, Nicholas Omamo Walunya, Natalii Khaemba, and Alfonse Achieno* who described themselves as adults suing in a representative capacity for themselves and on behalf of the Interested members of the Mumias Branch of the *Kenya Union of Sugar Plantation and Allied Workers* (KUSPW) following leave which was granted in Kisumu High Court on 19.9.2006.

The defendant is the General Secretary of Kenya Union of Sugar Plantation and Allied Workers (KUSPW)

The plaintiffs' claim against the defendant is for a permanent injunction to restrain the defendant from "causing a deduction and receiving 2% of basic salary as Union dues from the plaintiffs' employer, Mumias Sugar Company Ltd. The plaintiffs also sought an order to compel the defendant to convene a Special General Meeting of its members in compliance with its constitution to determine the percentage deductible from its members as union dues and further, a refund of 2% of basic salary deductions.

On 22/9/2006, the plaintiffs who claimed to be 949 in number sought injunction in the application made by way of a chamber summons of that date to restrain the defendant from collecting and receiving Union dues deductible by their employer, Mumias Sugar Company Ltd., pursuant to Kenya Gazette Notice No. 4980 of 28/6/06.

The main grievance against the increase of Union dues was predicated was the alleged failure by the

National Special Conference of the defendant to follow the constitution in convening and holding the meeting of 9/2/06 to resolve the increase of union dues from 1% to 2% from each member's basic salary. The plaintiffs also challenged the National Special Conference for adopting the increase when the matter was not part of the agenda of the meeting. The application was supported by the affidavit sworn on 18/9/06 by the four plaintiffs named in the suit. It was opposed by the defendant which filed a replying affidavit sworn on 11/10/2006 by Francis B. Wangara, the General Secretary of KUSPW.

When the application came up for inter partes hearing, Mr. Kasamani, learned counsel for the plaintiffs, contended that the approval of the plaintiffs as members of the Union was neither sought nor obtained and the resolution to increase Union dues was illegal. It was his contention that the increase was ultra vires the Union's Constitution. The Constitution of the Union at the material time, he said, was that which was registered with the Registrar of Trade Unions in the year 2001, a copy of which was annexed to the application and was marked "KNL4". He contended that the plaintiffs were impeded in their attempt to hold a Special General Meeting to discuss the deduction of Union dues and it was as a result of this that they came to court.

Mr. Obina, learned counsel for the respondent, on his part, submitted that the relevant Constitution as at the date of the decision in February, 2006 was the 2006 Constitution but Rule 6(d) in both the 2006 and 2000 Constitution was the same. It was his submission that the decision to increase the deduction from 1% to 2% was properly made and that the 2000 Constitution was amended as shown in the 2006 Constitution raising the deduction from 1% to 2% and that members were represented by branch officials. The alteration, he said, was in the agenda of the meeting. Although the individual members were not notified of the increase, contended Mr. Obina, nevertheless they were represented in the meeting by their branch officials. The decision, he added, was already registered by the Registrar of Trade Unions and that the application had no merit as the requirements for the grant of injunctions had not been met. He urged the court to dismiss the application.

Injunctions are discretionary remedies issued by courts of law to protect legal and equitable rights. In interlocutory applications, temporary or interim injunctions are issued by courts either to preserve the subject matter of the suit or to maintain the status quo pending the determination on merit of the issue in dispute between the parties. The principles governing the grant of interlocutory injunctions have been stated repeatedly in various authorities not least of which are *Giella v. Cassman Brown* (1973) E.A. 351. The conditions for the grant of interlocutory injunction require the applicant to show that there is a probability of success, that there will be irreparable damage which would not be adequately compensated for by damages unless the injunction is granted, and where there is doubt, that the balance of convenience would be in favour of granting the injunction. "*The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial*", see **American Cynamid Co. v. Ethicon Ltd. (1975) I All E.R. 504**. The power to grant interlocutory injunction is discretionary and must be exercised judiciously. Where the conditions for the grant of interlocutory injunction are established, the court will normally issue the injunction. See also **Mureithi V. City Council Of Nairobi (1981) Klr 332, And Kamau Muchuha V. The Ripples Ltd. C.A.(Nbi) Civil Application No. 186 Of 1992**.

Applying these principles, have the applicants made out a case for the interlocutory injunction that they seek?

The plaintiffs conceded that they are members of the KUSPW. They contended that their affairs with KUSPW are governed by the 2000 Constitution. Clause 3(b) of the said Constitution requires each plaintiff qua member of KUSPW to pay a monthly subscription of 1% of his salary to KUSPW subject to a maximum of KShs.200/= and to Central Organization of Trade Unions (COTU) Shs.10/=. On 9/2/06, the defendant held a meeting and resolved to increase the monthly payment per member to KUSPW. If the alteration of the constitution of KUSPW was wrongful and improper, it follows that the plaintiffs would not be bound by the alteration and hence would be entitled to an order to stop the enhanced deduction from their salaries. On the other hand, if the alteration of the constitutional provision hiking the monthly deduction as aforesaid was not improper, the plaintiff would be bound by the new

constitutional provision and consequently be enjoined to pay the enhanced deduction. In short, the issue is whether there is a valid constitutional provision binding the plaintiffs to pay the enhanced deduction or not. In effect, the application turns on the validity or otherwise of KUSPW's meeting of 9/2/2006 and the alteration of clause 3(b) of the Constitution resulting in increase to 2% deduction from basic salary of each member. The increase was gazetted on 7/7/2006 in Gazette No. 4976. Was the defendant enjoined to seek approval or consent of the plaintiffs to increase the deduction and if so what form or methodology was this required to take? Clause 6(d) of the KUSPW 2000 Constitution which remains the same in the 2006 Constitution stipulates that all decisions of KUSPW are binding on the members and where any decision affects directly the rights or privileges of any member or group of members, such member or group of members may within 30 days from the date of the meeting of the National Executive Board appeal to the Annual or Special Conference against such decision. There is no evidence that the plaintiff or any of them resorted to clause 6(d) to challenge the enhanced deduction from their salaries. But their failure to do so could not undermine their right to come to court. The main thrust of Mr. Kasamani's attack on the increase of the Union dues hinged on the fact that the agenda for the National Special Conference of 9th February, 2006 did not contain the increase as an item. There was no suggestion, however, that the plaintiffs were not represented by their representatives nor that the decision to increase was not carried (unanimously). Nor was it suggested that the matter of enhancement of the dues was not within the purview of the power of the meeting. Under clause 4 of the Constitution, the Annual Conference of KUSPW is the supreme Authority of KUSPW and it is responsible for making policy as well as decisions on domestic organizational matters. Amendments to the Constitution of KUSPW are made by the Annual Conference or Special Conference. The Conference is convened by the General Secretary on direction of the Executive Board or on request of one half of the fully paid up members of the Union who must sign a requisition and pay Shs.100,000/= to the National Treasurer of KUSPW for defraying expenses of such requisitioned meeting.

On the material before me, there is no evidence that the Special Conference was not properly convened. Nor is there any evidence that the plaintiffs met the conditions for requisitioning a Special Conference. The meeting of 9/2/2006 was not shown to be unconstitutional or to violate any of the terms of KUSPW's Constitution. I need not go into great details as these are matters that shall be revisited at the trial during the full fledged hearing when evidence shall be given and witnesses cross-examined. My examination of the issues is confined to determining the interlocutory injunction without more. After considering the affidavit-evidence, and the submissions of both counsel, it is my finding that the plaintiffs have not met the conditions for the grant of the interlocutory injunction that they seek. I am not inclined to grant the application. In the circumstances, I dismiss the plaintiff's application dated 22/9/06 and order that the costs of the application shall abide the result of the main suit. It is so ordered.

Dated at Kakamega this 15th .day of February, 2007

G. B. M. KARIUKI

J U D G E