



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Misc Appli 630 of 2005

KENYA GUARDS & ALLIED WORKERS.....APPLICANT

Versus

THE REGISTRAR OF TRADE UNIONS.....RESPONDENT

JUDGMENT

By a Notice of Motion dated 14th May 2005, the ex parte Applicants, Kenya Guards and Allied Workers Union and Paul Muyembe Ichiami, seek the following orders from the Registrar of Trade Unions:

- 1) An order of certiorari to issue to bring into this court and quash the decisions of the Respondent to register change of office bearers of the Applicant vide extract dated 14th January 2005 and any subsequent irregular registration of new Officials;
- 2) An order of mandamus do hereby issue to compel the Respondent to Register the suspensions of the current office bearers as National Officials of the 1st Applicant Union;
- 3) An order of mandamus do hereby issue to compel the Respondent to reinstate all previous Union Officials of the 1st applicant as at 9th February 2001;
- 4) An order of prohibition do hereby issue against the Respondent from irregularly registering any new National Officials of the 1st Applicant;
- 5) Costs of the Application to be provided for.

In support of the Application, Dr. Khaminwa, counsel for the Applicant indicated that he relies on the statement filed in court on 29th April 2005, the Verifying Affidavit of Paul Inchiami of 13th May 2005, and skeleton arguments filed on 13th October 2005. The Application was opposed and the Senior Assistant Registrar of Trade Unions Mr. William Kibet Langat swore a replying affidavit dated 30th January 2007. Michael Sande, Phanuel Owiti and Botul Ismael were joined to these proceedings as Interested Parties. Michael Sande Dallah, the Secretary General of the ex parte Applicant swore another replying affidavit dated 2nd April 2007 and the Interested Parties also filed skeleton arguments dated 2nd April 2007.

Briefly, the case of the Applicants is that on 27th September 2000, the Executive Committee of the 1st Applicant suspended the then Secretary General, John Okaka Gombe and appointed Paul Ichiami as the Acting Secretary General on 8th February 2001, who was confirmed in the appointment on 9th February 2001. Mr. Okaka filed HCCC 1771/01 in which injunctive orders were granted and the Respondent

reinstated Okaka to the post of Secretary General in March 2001.

In HCC 320/01, the 1st Applicant sought Judicial Review orders to quash the decision of the Respondent reinstating Okaka but the Application was dismissed as the Respondent allowed elections to take place. On 22nd August 2001, the Executive Committee of the Applicant again nullified Mr. Okaka's appointment on allegations of forgery but during that time the suspended officials organized other elections on 8th October 2001 in Mombasa yet the approval of the Executive Committee was not sought. The elections were not supervised by labour officials as required and the Respondent again proceeded to register new officials despite objections. As a result, HC Misc 1323/07 was filed by the Applicant for orders against the Respondent but it was discontinued and that elections of the 1st Applicant were barred.

That by an extract dated 14th January 2005, the Respondent recognized the appointments made on 22nd May 2004, yet the said changes were revoked and the Applicant's contention is that the decision to recognize those officials was bad in law and that the 2nd Applicant and other officials have been denied their rightful offices by the Respondents' actions, the Respondent has abused his office, exceeded his powers, was in breach of Rules of natural justice of audi alter am partem and therefore, the elections were irregular and flawed.

In his Affidavit, Mr. Langat deponed that HCC Misc Application 320/01 was dismissed in July 2002 and no orders were granted to the Applicant. That the National elections were held in July 2002 and registered and the 2nd Applicant never challenged them and the term of office ended in December 2005 when the Registrar issued a circular directing all trade unions to hold elections in all branches. (Circular NKH 1). That the National elections were held on 13th May 2005 and registered on 18th May 2006 (WKH 2) and therefore this Application has been overtaken by events, is an abuse of court's process and should be dismissed.

Michael Sande Dallah, the 1st Interested Party deponed that he is in the current Secretary General of the 1st Applicant following elections which took place on 13th May 2006. That the elections were carried out after an order issued by the Registrar calling for elections as tenure of offices of all trade union officials had lapsed (MSD 1) and that therefore the Notice of Motion by the Applicants is overtaken by events further that, it is not clear which decision of the Respondent the Applicants are challenging as none is exhibited. That elections having been done on merit, are not subject to be quashed. That some of the officers whose election was challenged have ceased to be members of the union and the court cannot therefore grant the orders sought. Lastly, that at the time of filing this Application the 1st Applicant was not under control of the 2nd Applicant and did not have the capacity to bring this Notice of Motion.

I have now considered the rival arguments, the affidavits, the statement, annexures to affidavits and submissions by Counsel, skeleton arguments and authorities cited. The decision challenged is said to be in an extract dated 14th January 2005 in which the Respondent allegedly registered change of office bearers. The Interested Party contends that the orders sought cannot be granted because no such decision has been shown to the court. Under Order 53 Rule 7 (1) Civil Procedure Rules, where an order of certiorari is sought to quash a certain decision, the order or document, a copy of the order or decision must be lodged with the court, verified by affidavit. The rule reads

“Rule 7 (1) in the case of an Application for an order of certiorari to remove any proceedings for the purposes of their being quashed, the applicant shall not question the validity of any order, warrant, commitment, conviction requisition or record unless before the hearing of the Motion he has lodged a copy thereof verified by affidavit with the Registrar, or accounts for his failure to do so to the satisfaction of the High Court.”

In this case, I have looked at the annexures filed with the 2nd Applicant's affidavits. There is no decision made by way of extract of 14th January 2005. If the Applicant could not get the decision by the time of filing the Chamber Summons or Notice of Motion, at least it should have been lodged by the time of hearing of the Notice of Motion and verified by an affidavit. If the Applicant could not lodge it, a

satisfactory explanation should have been given to the court as to the failure to lodge the said decision. None was availed to the court. This court has not seen the decision nor was any satisfactory explanation given to court as to failure to lodge it and the question is, does such decision exist? The court does not give orders in vain.

In the case of **SAMSON KIREREA M'RUCHIU V MINISTER OF LANDS & SETTLEMENT CA 21/1999**.

The Court of Appeal held that compliance with order 53 Rule 7 (1) Civil Procedure Rules is a precondition to seeking an order of certiorari and an Applicant who fails to comply disentitles himself to a hearing of the Motion. The failure to comply does not render the Application incompetent ab initio but renders the proceedings continued in violation thereof a nullity. So that a copy of the decision to be quashed can be lodged at the hearing of the Motion and in this case, none having been lodged either before or at the hearing of the Motion, the proceedings are a nullity.

There being no decision or order exhibited or an explanation given for failure to lodge the decision there is nothing for the court to quash and an order of certiorari cannot issue.

From what is on record, it seems that elections were done in 2001 and others followed in 2006 following the Registrar's Notice dated 9th December 2005 to all trade Unions starting from branch level to National level, as from 30th March 2006 to 30th June 2006.

It is on record that the Applicants had filed HCC 320/01 challenging the appointment of Okaka by the Respondent. The same was dismissed because elections were carried out the day before the hearing. The decision of the court was not annexed, for this court to appreciate or determine what transpired in court or exactly what the court decided. Was the dismissal after or before the hearing of this Notice of Motion? Because if that matter was heard and concluded, then the Applicants cannot purport to challenge the same appointment vide this Application.

The current officials have been appointed after the officials who had been challenged had been removed from office following elections called by the Registrar vide the Registrar's notice dated 9th December 2005. I would agree with the Respondents and Interested Parties submission that this notice has been overtaken by events as the Notice of Motion relates to changes made in the Union the previous term. The Applicants should have taken part in the elections in 2006 as this court cannot prolong the period allowed in the Union's Constitution as to when elections should be called. So that even if the Applicants had a good case for the grant of Judicial Review orders, the same being discretionary in nature, this court would not issue due to the fact that there are properly elected officials in office, the term whose officers was challenged having lapsed and this court would be interfering with the Constitution of the Union and the running of its affairs. This court cannot impose officials on a union. This court's powers are restricted to reviewing the process by which the Respondent reached its decision and no more.

Dr. Khaminwa told the court that in support of the Notice of Motion, he relies on the Verifying Affidavit of the 2nd Applicant sworn on 13th May 2005 filed with the Notice of Motion. Order 53 Rule 4 (1) Civil Procedure Rules provides that copies of the statements accompanying the Application for leave shall be served with the Notice of Motion and copies of any affidavits accompanying the Application for leave shall be supplied and no grounds shall be relied upon except those contained in the statement. Order 53 Rule 4 (2) Civil Procedure Rules then provides that use of any further affidavits can only be with the leave of the court and if a new matter has been raised by the opposing parties. In this case, the Applicant had filed a Verifying Affidavit accompanying the Chamber Summons Application dated 29th April 2005. It is the same Verifying Affidavit that should be used and relied upon in arguing the Notice of Motion. If any other affidavit was intended to be used by the Applicants, then the leave of the court had to be obtained. No leave of the court was sought when filing the Verifying Affidavit dated 13th May 2005. It is irregularly on record and is hereby struck out. I have had a chance to compare the affidavits of the 2nd Applicant dated 29th April 2005 and 13th May 2005 and they are basically the same. So even if the Verifying Affidavit dated 13th May 2005, is struck off, the one dated 29th April 2005 is still valid and

would suffice.

It seems that at the time of filing this Notice of Motion, the 2nd Applicant had been removed as the General Secretary of the 1st Applicant. It is only this court which would have decided whether or not he could be reinstated as such. At the time of filing this Application he cannot have been deemed to be acting on behalf of the 1st Applicant and the 1st Applicant should not have been named as an Applicant to these proceedings as the 2nd Applicant had no capacity to use his office on behalf of the 1st Applicant then. The 1st Applicant is wrongly enjoined to these proceedings as an Applicant and the orders sought could not have been issued in its favour.

In the light of this court's findings that there is no decision to be quashed and that the Application has been overtaken by events, this court finds no merit in the Applicants Notice of Motion and it is hereby dismissed with each party bearing their own costs.

Dated and delivered this 21st day of September 2007.

R.P.V. WENDO

JUDGE

Read in the Presence of

Ms. Omwakwe holding brief for Applicant

Daniel: Court Clerk