



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Misc Application 1582 of 2004

KENYA HOTELS AND ALLIED WORKERS UNION.....PLAINTIFF

VERSUS

THE REGISTRAR OF TRADE UNION.....DEFENDANT

RULING

By a Notice of Motion dated 6.12.2004 filed pursuant to leave of Court granted on 18.11.2004, Order LIII rule 3 and Order L rule 1 of the Civil Procedure Rules, SS 8 and 9 of the Law Reform Act (Cap 26, Laws of Kenya), Section 3A of the Civil Procedure Act (Cap 21, Laws of Kenya) and all enabling provisions of the law, the Applicant sought to be granted by the Court an Order of Certiorari to bring before this Court, to examine and quash the decision of the Respondent dated 12th May or November 2004 purporting to revoke the appointment of one Mr. John C. Rono to the office of the General Secretary to the Applicant Union, and that the costs of this Application be provided for.

The Application is based upon the Affidavit of one Jack Apollo Ouko, the Chairman of the Applicant Union sworn on 6.12.2004, and so far as concerns this application, the material averments are those set out in paragraphs 10, 11, 15, 16, 17, 18, 19, 22, 23, and 25 which are in these terms:-

***THAT as evidenced in document 'JAO 5" above, and upon giving the other executive officers a hearing on the issues of administration as raised by the Acting Secretary General,, members of the Union unanimously agreed that the wrangling in the Union were as a consequence of the vacant position in the Union structure***

***10. THAT in the premises and in exercise of the powers conferred to the Applicant Union pursuant to the provisions of Rule number 3.4 of the Article VII (a) and (e) of the Constitution and Rules of the Kenya Hotels and Allied Workers Union (KHAWU), the Applicant Union during the afore-stated National Executive Committee meeting held on 16th October 2004 at the Union headquarters unanimously decided that the vacant positions be filled by the instant Board, the Board unanimously agreed to the invitation of one Richard Obuya a former Board Member to be appointed a Returning Officer, (para 12),***

***11. Elections were carried out. Joannes Okotch and J.C Rono were the only candidates to the office of Secretary General.. One J.C. Rono scored by winning 12 votes, out of the 20 electors against Joanes Okotch 8 votes. So Mr. J.C. Rono was appointed Secretary General of the Applicant Union, (para 13)***

***12. THAT in consonance with the provisions of Section 38 of the Trade Union Act, (Cap***

233, of the Laws of Kenya), the Applicant Union, on 18.10.2004 filed with the Respondent a Notice of change of Names of Titles of Officers dated 16.10.2004 together with minutes of the proceedings of the Board of the Applicant Union of the meeting of 16.10.2004 and a copy of a report by the Returning Officer during the polling exercise.

13. **THAT as a consequence of filing the above Notice, the Respondent received various objections where-at he on the 26.10.2004 wrote to the Secretary- General indicating that he had received several objection letters and further requiring the Secretary General to respond to the issues raised therein, and to which letter the Secretary General promptly responded to on 27.10.2004( para 16)**

14. **THAT following the conclusion of those investigations the Respondent confirmed the Notice of change of names of Titles of Officers by his letter dated 4.11.2004**

15. **THAT by that letter Mr. J.C. Rono was constituted Secretary General of the Applicant**

16. **THAT on the next day 5.11.2004, the said J.C. Rono received a telephone call from the office of the Respondent directing him to call a meeting of the Applicant Union for an informal meeting to discuss the issue relating to the dissatisfaction with the legal and constitutional registration of the changed officers**

17. **THAT despite written protest as to the nature of the new complaints, the Respondent refused to respond and by a letter dated 12.11.2004 the Respondent revoked the registration of the changes of the names of titles of officers ( para 21)**

18. **THAT the revocation has caused confusion in the operations of the Applicant Union, and enabled malicious members of the Union to organize a gang who broke in and stole all the members files together with lists of attendances amongst other documents as evidenced by Police Abstracts annexed to the affidavit para 22)**

19. **THAT the revocation was guided by malice, irrelevant and/or improper external forces and that the same is in the circumstances unlawful, unreasonable, capricious, arbitrary and contrary to the principles of law and natural justice”.**

At the end of his Affidavit, the Chairman of the Applicant pleads that in the premises, it is only fair and just that the Respondent's decision be investigated and quashed for being

- (i) **Ultra vires** the provisions of section 38(4) of the Trade Unions Act, Cap 233, Laws of Kenya
- (ii) Contrary to the spirit in the provisions of rule 3.4 Article VII (a) & (e) of the Constitution and Rules of the Kenya Hotels and Allied Workers Union;
- (iii) Contrary to the rules of natural justice,
- (iv) In excess of Respondent's powers,
- (v) Otherwise unreasonable, and founded on irrelevant considerations.

In response to the Application the 1st Respondent (that is the Registrar of Trade Unions filed two affidavits namely, the Replying Affidavit of William Kibet Langat, the respondents Assistant Registrar sworn and filed on 10.01.2005, and another Replying Affidavit, which he should, I think have styled a Supplemental Affidavit sworn surprisingly, on 1.04.2005, but filed a month earlier on 1.03.2005.

There was also a Replying Affidavit of one Joanes Okotch, the Interested Party sworn on 10.02.2005, and filed on 15.02.2005, the material part of which is paragraph 20 where this deponent swears-

***“20 THAT the decision of the Registrar of Trade Unions is well founded in law and the same is justified vide the provisions of Section 38(4) of the Trade Unions Act and Rule 3.4 Article VII (d) of the Union Registered Constitution”***

To the Replying Affidavits of William Kibet Langat, the Assistant Registrar of Trade Unions and Joanes Okotch aforesaid, Mr. Jack Appollo Ouko, the Chairman of the Applicant Union filed Further Affidavit sworn on 14.01.2005.

To the Replying Affidavit of Joanes Okotch, the Chairman avers that he has not brought these proceedings personally. The proceedings are in the name of the Union. The Chairman also avers that the said Joanes Okotch has never been elected Secretary General, although he may have misrepresented himself as such. A letter to himself from the Assistant Registrar dated 24.11.2004 which states the practice in all constitutions that in the absence of the substantive holder of an officer his deputy performs his duties till the post is substantively filled whether by election or appointment. Joanes Okotch could not therefore carry himself out as Secretary General of the Union.

As to the Affidavit of the Assistant Registrar William Kibet Langat, the Chairman of the Applicant depones that the Assistant Registrar had no lee way on a 9th December 2004 when he wrote a letter to five members of the Union including one John Rono (for non payment of monthly dues) because as of that date there was already in force an order staying the decision of the 1st Respondent, the Assistant Registrar revoking the appointment of one Mr. John C. Rono to the office of Secretary-General to the Applicant Union.

Having put forward some of the respective parties contentions it is now necessary to frame the basic issues as seen by the Applicant and the Respondents and in particular the 1st Respondent the Registrar of Trade Unions. I will commence with the case of the Registrar of Trade Unions because it is he who is accused by the Applicant; of in particular, breaching the rules of natural justice for failing to inform or notify the Applicant that he was on a course to revoke the registration of the Changes of Titles of officers of the Applicant.

The Registrar's case is that where the Registrar comes to the realization that changes registered by him were made in contravention of or were not made in accordance with the Unions Constitution or the Trade Unions Act, he can rescind his decision and revoke the registration of such changes. His grounds were that

1. Notices of the meeting did not have on agenda for election and filling of the position of Secretary General;
2. there was no issue for discussion of the Unions Administrative Structure
3. the meeting of 16.10.2004 had no mandate to fill the vacancy of Secretary- General
4. the election of the position of Secretary General was to be done by a Special Meeting to be convened by the Chairman in accordance with the resolution of the National Executive Board held on 7th August 2004;
5. there was no meeting convened to resolve the issue of the position of the Secretary General.
6. there was no general list of attendance to confirm attendance and quorum, that the list filed was merely a list of Executive Board members meeting allowances acknowledgment (para 6 of the Replying Affidavit of William Kibet Langat filed on 1.03.2005)
7. because there was no genuine list to confirm such attendance and quorum the meeting was irregular and necessitated the Registrars intervention in the interests of justice (para 7)
8. The Registrar did not violate the rules of natural justice as she had directed the applicant to hold

another National Executive Board Meeting within (21) days where all the members of the National Executive Board members were to attend (para 8 letter dated 12.11.2004), a week after revocation of registration of the office of Secretary-General;

9. the Registrar being the person in charge of administering all Trade Unions within the Republic of Kenya was alive that a vacancy such as was existing in the Applicant was bound to cause a lot of anxiety and wrangles within itself and directed that the Union do hold another meeting within a reasonable period of time to where every body would be informed that the vacancy of the Secretary-General would be filled so as to make informed choices.

10. The National Executive Board Meeting of 16.10.2004 had no prior knowledge of filling of the vacancy of the Secretary Generals position which was only disclosed at the meeting.

11. the Applicant being a representative of the hotel industry which is central to the tourism industry should be handled with utmost care.

12. the Registrar arrived at her decision to revoke the registration of John C. Rono having taken all relevant factors and considerations into account;

13. the application herein is mischievous, frivolous and vexatious and ought to be dismissed with costs.

In addition, the Registrar also urged that Section 2(2) of the Trade Union Act, empowers the Registrar to change his own decision in the interest of the Union, and that the letter of 12.11.2004 gave all members of the National Executive Board an opportunity to elect a Secretary General.

That was the Registrar's case in opposition to the Applicant's case. The Registrar also had an ally in Ms Guserwa learned Counsel for the Interested Party Joanes Okotch who opposed the application on the ground that the Applicant was not the aggrieved party, but one John C. Rono and Jack Apollo Ouko because there were no infringement of the rights of the Union, but those of one John C. Rono and that this is contrary to Section 27 of the Trade Unions Act, and the Application is an abuse of the court process.

Counsel submitted that Section 36 of the Trade Unions Act requires that rules of the Union be filed with the Registrar. Under the Union's constitution elections are carried out either at a Special or General Meeting. Elections carried out at any other meeting would be **ultra vires** the constitution.

Counsel further submitted that the meeting of 7.8.2004 made specific resolutions as to the convening of the Special Meeting. The meeting of 16.10.2004 was not convened by the Chairman, the meeting was neither Special nor a General Meeting a body empowered to discuss the Administrative Structure of the Union as resolved in the meeting of 7.08.2004. So the meeting of 16.10.2004 had no authority to fill the position of Secretary General, and the Secretary General elect had no authority to file any return to the Registrar.

Counsel relied upon the case of ***Republic vs Registrar of Trade Unions and 2 others, Ex-Parte John Elijah Wambula Wildred Wambua Stephen Mutambi and Bakari Bwetta*** (Applicants) in which Ransley J found on the facts of that case that the Registrar acted properly.

On these submissions learned Counsel submitted that the Registrar acted properly and again that the Application be dismissed with costs.

I have deliberately set out the Registrar's case, and that of the Interested Party I shall now consider the relevant provisions of the Trade Unions Act, and the relevant provisions of the Applicant's Constitution in answer to the Applicant's case and perhaps the only issue in this Application that the Registrar acted in breach of the rules of natural justice in revoking the registration of the Applicants Secretary General elected by the National Executive Board at a meeting held on 16.10.2004.

Reference was made to the provisions of Section 2(2) of the Trade Unions Act which empowers the Registrar in these terms-

***“(2) whenever by this Act the approval of the Registrar for the doing of any act is required there shall be implied a power in the registrar to refuse his approval or to grant his approval subject to such conditions as he may impose and for good cause to revoke any approval so granted.”***

This provision does not in my understanding give blanket approval to the Registrar to revoke or grant approval, except pursuant to a specific power donated to the Registrar under the Act. Section 27 of the Act was cited to me as giving the Registrar that power. This section however only governs the institution and maintenance of proceedings by and against trade unions. In the context of Ms. Guserwa's submissions that the Applicant was one J.C. Rono and not the Trade Union, this Section (27)(1), expressly provides that a registered trade union may sue and be sued and be prosecuted under its registered name. The contention to the contrary is therefore not correct. The action herein is properly instituted by the trade union – Applicant.

Section 36 of the Trade Unions Act was also referred to by Ms. Guserwa, learned Counsel for the Interested Party. Section 36(1) merely provides that the rules of every Trade Union must provide for the matters set out in the schedule to the Act. The matters relevant to the Application herein and to be provided for in a Trade Union rules or constitution include, rule 4 which is that the rules of every trade union must provide for the ***appointment election and removal of an executive and of trustee, Secretaries, treasurers, and other officers, of the trade union.***

The relevant rule in the Applicant's Constitution enacted pursuant to Section 36(1) of the Trade Union Act and the Schedule thereto, is Article VII which provides inter alia-

***(a) The National Executive Board shall be the governing body and shall be responsible for the management of the affairs of the Union, and shall exercise control over the officers of the Union;***

***(b) Sets out the composition of the National Executive Board it includes a Chairman, Deputy National Chairman, Secretary- General, Deputy Secretary-General National Treasurer, Deputy National Treasure etc***

***(c) The National executive Board is required to meet at lease every 3 months***

***(d) All decisions of the National Executive Board shall be binding to the Union and on each of its officials and members provided if any such decisions directly affect the rights and privileges of any members or group of members or officials they may within 30 days of the date of the meeting of the National Executive Board appeal to the Special Conference against such decision.***

***(e) In the event of death, resignation or expulsion of a member of the National Executive Board (NEB) or an officer, the vacancy shall be filled by the member approved by the NEB she/he shall attend all meetings of the National Executive Board until the proper elections are done at the Special or General Conference”***

Articles V and VI respectively create the General Conference, and the Special Conference.

The General Conference which is the Supreme Authority of the Union, is held every five years, at such time and place as decided upon by the National Executive Board. The General Conference is convened by the Secretary General by giving 28 days notice in writing to each Branch of the Union.

Two Special Conferences may be held between General Conferences. The Special Conference is convened by the Secretary-General on the direction of the National Executive Board upon the written

request of 1/10 (one tenth) of the fully paid up members of the Union each of whom shall sign a requisition, and ensure payment of Shhhs.100,000/= to the National Treasurer to defray the costs of such Special Conference.

The Registrar says that he acted in accordance with the powers conferred upon him by the provisions of Section 38 of the Trade Unions Act which provides as follows:-

**“38 (1) – not applicable.**

***(2) Notice of all changes of officers or of the title of any officer shall, within seven days after the change, be sent to the Registrar by the trade union together with the prescribed fee, and the Registrar shall, subject to subsection (4) and (5) register the changes accordingly.***

***(3) Not applicable.***

***(4) Before registering any change of officers or correcting any register the Registrar may require the production of such evidence in relation to the change of officers or the correction asked for as he deems necessary to satisfy him as to their validity or propriety.***

***(5) If, after such enquiry as he deems necessary the Registrar is not satisfied as to the validity of any appointment or the propriety of any proposed correction to the register, he may refuse to register the change of officers or to correct the register, or he may refer the matter to a Trade Union’s Tribunal composed of one or more independent persons appointed by the Minister, and in that case the Tribunal shall inquire into the matter and make its recommendations herein to the Registrar, who shall there upon register or refuse to correct in accordance with those recommendations.***

***(6) No change of officers shall have effect until registered by the Registrar.***

***(7) Creates offences for any officer of the Trade Union acting without being registered with the Registrar.***

***(8) The rules of a trade union shall provide for the election or reelection by secret ballot of all the officers of the trade union , at least to be held not less than once in every year.***

***(9) Failure to hold elections as provided in subsection 8 or the rules, is an offence.***

***(10) Any party aggrieved by the refusal by the Registrar to register a change of officers, or to correct the register under this section may, within one month of the date of refusal, appeal against the refusal to the High Court and on such appeal the court may make such order as it thinks proper including an order as to costs of the appeal and the order of the High Court shall be final.”***

The Registrar says that he acted in accordance with the provisions of Section 38 (4) in revoking the registration of J.C. Rono as Secretary General of the Applicant Trade Union. Whereas this is correct in so far as the first inquiry leading to the registration of the Notice of Change registered on 4.11.2004 was concerned, it is certainly not correct in so far as the revocation of the registration of the Notice of change of offices conveyed by the Registrar’s letter of 12 November 2004.

Having received further complaints after his letter of 4.11.2004 conveying his decision to register the changes, the Registrar should have acted in the manner prescribed in Section 38 (4), and called for an inquiry into the fresh allegations against the election of the Secretary General. He could not act unilaterally on the further information without affording the union represented by the Secretary General J.C. Rono an opportunity to be heard. Calling members for a meeting in his office did not discharge his onerous duty to call for an enquiry or refer the matter to a Trade Unions Tribunal under Section 38 (5) of

the Trade Unions Act. By revoking the Secretary Generals registration, the Registrar actually acted *ultra vires* the powers conferred upon him under Section 38 (4) and (5) of the Trade Unions Act.

Indeed as the authors of the Supreme Court Practice, 1997 Edn. Vol. 1 Part 1, says in para. 53/1 – 14/6 – Nature and scope of Judicial Review –

***“the remedy of Judicial review is concerned with reviewing, not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself. The purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected, and it is no part of the purpose of judicial review to substitute the opinion of the judiciary or of individual Judges for that of the authority constituted by law to decide the matters in question”***

***(Chief Constable of North Wales Police vs. Evans [1982] IW.L.R. 1155 p.1160. [1982] 3 ALL ER 141, p.143 per Lord Hailsham L.C.). Thus a decision of an inferior court or a public authority/like the Registrar in this case) may be quashed (by an order of Certiorari made on application for judicial review) where the court or authority acted without jurisdiction, or exceeded its jurisdiction, or failed to comply with the rules of natural justice in a case where these rules are applicable.***

These sentiments were echoed by the Court of Appeal in the case of ONYANGO vs ATTORNEY GENERAL [1987] K.L.R 711, and also the case of NYONGESA & 4 OTHERS vs. EGERTON UNIVERSITY COLLEGE [1990] K.L.R. 693, where the Court of Appeal held *inter alia*:-

***“Courts are loath to interfere with decisions of domestic bodies and tribunals including college bodies. However Courts will interfere to quash decisions of any bodies when moved to do so where it is manifest that decisions have been made without fairly and justly hearing the person concerned or the other side.”***

In the case of OLOO VS KENYA POSTS & TELECOMMUNICATIONS CORPORATION, [1987 K.L.R. 830, the Respondent Corporation had recalled the Appellant to work with a condition or caution that if he declined, it would result in the suspension of his pension, a prejudicial demand which the Appellant should have been given an opportunity of meeting it, the Court of Appeal held:-

***“The Respondent should have invited the appellant to give an explanation for his acceptance of the new appointment or to show cause why he should not be recalled with the consequence of having his pension suspended if he did not do so”. The Respondent had failed to observe the rules of natural justice”***

There is another reason why the decision of the Registrar should equally be quashed. The Registrar moved upon the wrong principle that it is the Conference which fills any vacancy upon the death of any member of the National Executive Board. Under Article VII (e) of the Applicant’s Constitution such vacancy is filled by the National Executive Board, and which may also interdict or suspend or remove from office any officer working against the aims and objectives of the union.

For all these reasons, I am satisfied that the Registrar of Trade Union acted in a manner inconsistent with the powers entrusted to him by the Trade Unions Act, Chapter 233, Laws of Kenya. The Applicant union therefore succeeds in his application dated 6th October 2004. There shall be orders accordingly including costs.

Dated and delivered at Nairobi this 29th day of September, 2005.

**ANYARA EMUKULE**

**JUDGE**