REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO.1255 OF 2002

KENYA UNION OF POST PRIMARY

TEACHERS ……………………………………….PLAINTIFF

V E R S U S

TEACHERS SERVICE

COMMISSION ……………………………1ST DEFENDANT

PETER WANYONI BUTEYO ………….2ND DEFENDANT

ZEDEK O. A. LAMECK ……………..….3RD DEFENDANT

JOHNSON M. WAITHAKA ……………..4TH DEFENDANT

REGISTRAR OF TRADE

UNIONS ………………………...……….5TH DEFENDANT

R U L I N G

In this case the parties are Kenya Union of Post Teachers – plaintiff and defendants are 1st defendant T.S.C, 2nd defendant Peter Wanyonyi Buteyo, 3rd defendant Zedok Onyango Lameck, 4th defendant Johnson Muthama Waithaka and 5th defendant the Registrar of Trade Unions. I refer to this format because earlier on there was a civil case no.147 of 2001 wherein Wanyonyi Buteyo and others were plaintiffs and Tom Chariga and another as defendants. Hon. Kuloba J had delivered a ruling in that case which was referred to freely here. Then there is the HCMisc.aspp.No.495 of 2002 a Judicial Review application No.495 of 2002 wherein the Kenya Union of Post Primary Teachers is the applicant and the Registrar of Trade Unions is the respondent asking for an order of mandamus to compel the respondent to deregister the list and names of those registered as Union Officials on 30-4-02. In this particular case the plaintiffs are asking for injunction to compel the defendants to deregister the registered officials on 30-4-02, and a declaration that the Union elections held on 26-4-02 were null and void.

It is upon this background that the applicants by chamber summons of 25-07-2002 pray for orders that:- 2nd, 3rd and 4th defendants be restrained jointly and or severally from running the applicant union duties from unregistered office at Ufundi Co-operative House. (2) That the 1st defendant be ordered to release Union funds deducted from Union members to the current bank account number 011- 004-076-000-0 at the Co-operative Bank of Kenya at the Ukulima Branch Haille Selassie Avenue in Nairobi. (3) That old Union office bearers be adjudged the ones to run the elections until new elections and that elections of 26-4-02 be declared null and void.

Supporting affidavit by Monica Ngethe sworn on 25-7- 02 says she is the Assistant National Treasurer of the applicant Union and also appointed by NEC to be acting Secretary General of the Union and that one Raphael Muricho called for a meeting on 26-4-02 against the constitution of the Union and that 1st defendant has no right to hold the Unions funds and as the office rent is overdue and is in arrears the Landlord is threatening to evict . The Union branches have not been in contact with each other as they cannot use telephones. The deponent enumerates what she considered anomaly which in effect made the special delegates meeting of 26-4-02 faulty and annullity and ought not to have been registered by the Registrar at all.

The first defendant through affidavit of Christopher Ngumba Chief Accountant of Teachers Service Commission (1st defendant) sworn on 4-10-02 says they have not been served with bank account number and that another case No. Nairobi CMCCC No.247/02 is still pending in which there is an order to maintain status quo.

At the hearing of this application all parties opposed the application with Mrs Sichale for 2nd, 3rd and 4th defendants being supported by Mr. Mororo learned counsel for the 5th defendant. Her very clear grounds which were succinctly presented were:-

Firstly that prayers are both for prohibitive and mandatory injunctions yet the application is based under O.39 of procedure rules which only caters for prohibitory injunction. Secondly that Giella vs Cassman Brown Ltd principles are not satisfied. Thirdly that the plaintiff is not registered official of plaintiff Union and cannot bring an action on its behalf. She is not Assistant Secretary as the post is elective and she was not elected but merely appointed. She is bound by ruling of Kuloba J requiring that Judicial Review is needed to quash decision of the Registrar. That the applicant has filed many cases and that this is an abuse of courts process.

Mr. Morroro in support further said that Mr. Mararia had not shown the date when the parties took up office. Mr. Nganga said that the Registrar`s decision was right and has not been challenged as plaintiffs did not complain when the Registrar gave date and venue of the meeting. Mr. Mararia answered all these objections.

There are many points and all learned counsel did their utmost to present the position as they could and I am indebted to them. There are two points I would like to revert to preliminarily. First as to how mandatory and prohibitive injunctions are brought to court. It is trite that both are equitable remedies and are subject to those well known qualifications of equity like equity follows the law.

One can only avail himself to equitable remedy if he comes to it with clean hands, but in application the two rely on the principles enunciated by the Court of Appeal in **GIELLA vs CASSMAN BROWN & CO. LTD** 1978 EA 358. That interlocutory injunction can issue where the applicant shows that he has a prima facie case with probability of success, it can only be that the applicant would suffer irreparable injury that cannot be compensated with award of damages unless if injunction is not granted and the court is in doubt to decide the case on a balance of convenience. However as for mandatory injunction the law has spelt out further stringent terms. First the court cannot grant interlocutory mandatory injunction under O.39 of the Civil Procedure Rules but the Court of Appeal in **ADONIA v MUTEKANGA 1970 EA 429** and in **DESPINA PONTIKOS [1975] EA** 38 has confirmed reliance on inherent jurisdiction of the court to award mandatory injunctions under S.3A of the Civil Procedure Act Cap.21 but the jurisdiction is discretionary and should be exercised only in special circumstances very sparingly and almost with reluctance. In this application there is reliance on S.3A which vindicates the applicant herein. There is observation that the two compulsory orders prayed are substantial prayers in the main suit and may not be granted in interlocutorily applied but here the court of appeal has stated in **E. A. FINE SPINNERS LTD** (In **Receivership) & 2 others Vs BEDI** IN**VESTMENTS LTD per Gicher**u (J.A) that even where a mandatory injunction would amount to the grant of a major part of the relief claimed in the action as is in this case this should not be a bar. There are other considerations but not pertinent.

The second point is where all counsel very properly argued that this ought to have been a Judicial

Review application simply for order of mandamus or certiorari to cancel the registration and that in fact there was such an application earlier on. This is a big matter and is intellectually presently exercising the courts mind because it brings into focus the distinction between public and private law a distinction which is very difficult to draw and has been called defination without distinction but essentially it is a matter of policy where Judicial Review with it special procedure is meant to quickly correct administrative excesses and also conversely to protect such administrative actions from vexations litigations and delay. The matter is left to the courts to determine by use of Locus Standi whether a matter is suitable for Public Law Remedy and following the decision of English (House of Lords) Court in the case of OLREALY v MACKMAN 1983 AC 237 courts are now striking out actions that are suitable under Order 53 but are filed as plaints or originating summons.

In that case 4 prisoners brought action after Prison Riot England they challenged as invalid the disciplinary decision met out against them by prison visitors they claimed they breached Natural Justice. Had they come by Judicial Review Leave would have been refused as the application was not meritorious.

Diploth LJ said:-

> **"……All remedies of infringement of rights protected by Public Law can be obtained upon an application for Judicial Review as can also for infringement of rights."**

Under private law if such infringement should also be involved, it would in my view as a general rule be contrary to public policy and as such an abuse of the process of the court to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of ordinary action and by this means to evade the provisions of O.53 for the protection of such authorities.

The judge later in the said decision said the development of procedural law should be left to be decided on a case to case basis. It means that we have to wait until the court of appeal gives an opinion on the matter. There are many cases already existing in England on this point but Lord Diplock`s decision is still the law and we are persuasively entitled to apply. The decision gives courts leeway to extend the scope of Judicial Review, but in my view courts should not strike out proceedings or entertain arguments on right procedure as a preliminary point, but can decide and direct what procedure should be adopted. Mrs. Sichale did not give any suggestions neither did the other counsel, but I think this is a case which should be litigated under Judicial Review. It is not as the applicant wants a proper thing to do for the court to constitute itself the decision maker instead of the Registrar of Trade Unions as was here. If the argument was that he allowed wrong people to constitute the Annual Delegates Conference, or sanctioned a meeting improperly called. His actions were ultravires and ought to be quashed. That would clear the matter and pave the way for a proper Annual Delegates Conference to be held. To issue interlocutory injunctions is merely to forestall the issue and it means the situation would remain unsolved awaiting court proceedings whose determination would take unknown time.

Even if I had to consider both prayers of prohibitory and mandatory injunctions it is my view that I would not have granted the prayers as I do not think that there is a prima facie case with probability of success and noting the courts principle that courts should not overly interfere with administration of societies. The balance of convenience may lie in allowing the Registrars decision to hold until set aside, otherwise there would be anarchy.

For these reasons I respectfully decline to grant the orders prayed and dismiss the application with costs. But I direct that the substantial case be set for immediate hearing within one month.

A. I. HAYANGA

JUDGE

Read to Mariara on 12.5.2003

A.I. HAYANGA

JUDGE