



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MISC APPLICATION NO. 1082 OF 2001

JEREMIAH KORASH.....PLAINTIFF

VERSUS

THE REGISTRAR GENERAL.....DEFENDANT

RULING

This is an application by Kenya Quarry and Mines Workers Union and its registered officials for:

1. An order of certiorari to bring into this court and quash the decision of the Registrar General contained in the letter dated 6th September 2001 nullifying the election results held on 7th August 2001 by Kenya Quarry and Mine workers Union.
2. An order of Mandamus commanding the Registrar General to register the elected officials in terms of the aforesaid election result.

There are three grounds to support the application namely:-

1. The Registrar's decision was unilateral and in contravention of Rules of natural Justice as it was based on allegations purportedly obtained from a single objector who was also a participant in the elections and the interested parties/applicants were not given an opportunity to present their case.
2. The Registrar exceeded his powers by nullifying the election results while the same had been conducted with his approval and in accordance with the law applicable herein
3. The registrar's decision was unlawful and without any reasonable or probable cause and is prejudicial to the applicants herein.

The application is supported by a statement dated 13.9.2001 and several documents It is also supported by a verifying affidavit of

Mr. Wafula Musamia sworn on 13.9.2001 and by a further affidavit sworn by Mr. Nelson Mwaniki Kiromo sworn on 25.1.2002. The Respondent – Registrar General opposes the application.

Mr. William Kibet Langat – the Assistant Registrar of Trade Unions has filed a replying affidavit sworn on 16.11.2000. The application is also opposed by Mr. Henry Koweru who instructed Mr. Ogutu Advocate to oppose the application on his behalf.

By a letter dated 6.3.2001 the Registrar of Trade Unions wrote to all registered Trade Unions directing them to hold elections of all officers at the Branch and at National level between 30th April 2001 and June 2001 and that such elections be supervised by officials of the Ministry of Labour. The Union in the

present case held election of national officials on 7.8.2001 which were supervised by S.M. Mbae Assistant Labour Commissioner.

The elected National Secretary General Mr. Wafula wa Musamia sent notification of the change of officers to the Registrar of Trade Unions on 7.8.2001 for registration.

On 7.8.2001 Mr. Simon Beru Imoti; Henry Koweru and Andrew Omollo and others wrote to Registrar of Trade Unions strongly objecting to purported elections or changes claiming that the elections were unlawful and unconstitutional and that they should be declared null and void. Their grounds of complaint were that:

- (a) Rule 6(a)(1) was not followed in that no meeting of the national executive committee was convened to direct the General Secretary to set date, venue and time of the special conference.
- (b) The special conference notice was not issued to the accredited delegates as required by the Unions registered constitution.
- (c) There was no quorum.

Upon receipt of that objection Mr. Langat for Registrar of Trade Unions wrote to the National General Secretary of the Unions informing him that the validity of the elections had been challenged. He sent the objection to the National General Secretary for comments. The National General secretary wrote by a letter dated 8.8.2001 confirming that the elections were held according to the Union's Constitution.

On 8.8.2001 Mr. Henry Koweru wrote to the registrar of Trade Unions raising additional objections to the elections that, two people participated in the election when they were not members of the Union. By a letter dated 9.8.2001 the Registrar of Trade Unions sent the reply of the National General Secretary to Mr. Koweru for comments. By a letter dated 10.8.2001, the Registrar of Trade Unions wrote to Mr. S. M. Mbae enclosing Mr. Koweru's two objections and asked for his views.

Mr., S.M. Mbae wrote to the Registrar on 13.8.2001 giving a very detailed explanation of how the elections were held. He confirmed that special conferences notice were properly forwarded to accredited delegates; that Mr. Koweru was aware of the elections, that there was a quorum and that the elections were held in accordance with the Union's constitution.

By a letter dated 6.9.2001, the Registrar's of Trade Unions wrote to the Unions Secretary General. He informed him that:

- (i) Objections were raised to the registration prompting Registrar to conduct inquiries to establish the validity or propriety of the elections
- (ii) That upon conclusion of the investigations the Registrar was satisfied that the elections were not held in accordance with the constitution for the reason that non members were allowed to participate and vote, that under the circumstances there was no quorum and, that the National Executive Committee did not meet to fix date, venue and time of the special conference.
- (iii) The Elections have been nullified and a repeat ordered.

The applicants have annexed a certified extract from the Registrar of Trade Unions of Officers, trustees General counsel and Executive committee members. It shows that Mr. Daniel Masibu Nyamai and Josephat Nyoro Waithaka who were said to be non members are in fact Trustees.

The applicants have also annexed a notice to all members of National Executive Committee dated 16.7.2001 convening a meeting for 23.7.2001. The applicants have also annexed the minutes of the

Executive Committee meeting of 23.7.2001 which set date of elections.

Section 38(3) of Trade Unions Act requires the Registrar to register notice of change of officers subject to section 38(4) and section 38(5). By Section 38(4) the Registrar before registering any change of officer may require production of such evidence in relation to change of officers as he may deem necessary to satisfy himself as to their validity or propriety. By Section 38(5), if the Registrar after such inquiry is not satisfied as to the validity of any appointment, he may refuse to register the change of officers. Section 38(10) gives any party who is aggrieved by the refusal to register a right of appeal to the High court.

It is argued on behalf of the respondent and on behalf of Mr. Henry Koweru that the applicants sole remedy was to file an appeal. But it is trite law that the fact that a party has a right of appeal does not preclude him from seeking redress through Judicial review. The applicants have not exercised the right of appeal. Their application for Judicial Review is competent.

The Registrar of trade Unions is required to exercise his powers under S. 38(4) and S.38(5) in good faith and reasonably He is not allowed to exercise his powers arbitrarily, capriciously or in bad faith – See Republic and The commissioner of Co-operations & Others – CA No. 39 of 1997.

As section 38(4) and 38(5) clearly show, the Registrar is required to exercise his own discretion independently upon receipt of a notification of change of officers whether to register the change of officers or to call for any evidence to support the notification of change. There is no provision in section 38 which authorizes the Registrar to invite or receive or to consider any objections from anybody. It is clear that the Registrar in this case did not exercise his discretion independently whether to register or call evidence upon receipt of the notification of change of officers. He was moved by Mr Henry Koweru and others to reject the registration of the notification of change. It is after receiving objections that the Registrar started corresponding with the objectors, the National Secretarial General and the Supervisor of the elections. In the process he assumed the role of Adjudicator of the dispute.

Section 28 of the Trade Unions Act does not, in my view, give the Registrar power to hear any disputes regarding the validity of the elections and to adjudicate on such a dispute in the same manner that Courts of Law adjudicate such disputes. It is also my view that if such a dispute arises before the Registrar he should refer the parties to court.

Assuming that the Registrar has jurisdiction to determine disputes on the validity of elections, then, he is required to follow the Rules of natural justice and hear both sides which he did not do in the present case.

The Registrar does not say what inquiry he conducted in this case other than receiving objections and reply to the objection.

A very Senior Government Official Mr. S.M. Mbae – An Assistant Labour commissioner supervised the elections and filed a independent and very comprehensive rejoinder to the objections.

In that report he has shown that the requisite procedure before holding the elections was followed by the Union and that the election were held in accordance with the Union's constitution. The applicant have filed a notification of the meeting of the National executive committee dated 16.7.2001 and the minutes of meeting of 23.7.2001. They have also filed a certified extract of official from Registrar of Trade Union showing that Mr. Nyamai and Mr. Waithaka were trustees. There is no evidence that the Registrar called for such evidence from the Union. He does not say why he did not agree with the independent report of Mr. S.M. Mbae, the Supervisor of elections.

It appears to me that the Registrar did not even do any independent inquiry and that he nullified the elections merely on the basis of the partisan objection.

For the above reasons, I am satisfied that applicants have established that the decision of the Registrar

was made in excess of his jurisdiction; was ultra vires, arbitrary, unilateral and unlawful. This is a case where the Registrar did not perform his statutory duties within the law. The evidence before the court shows that there was no valid reason for refusal to register the notification of change of officers.

Consequently, I allow the application with costs and grant the orders of certiorari and mandamus as prayed in prayer 1 and 2 of the application.

E. M. Githinji

Judge

13.6.2002

Mr. Nduati present

Mr Osoro holding brief for Ogutu present

Mr. Langat present

Mr. Osoro

I apply for leave to appeal

Court: Order is appellable as of right under the Law Reform

Act

E. M. Githinji

Judge