



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NO.387 OF 2002

SALIM IDD MWASINA & 2 OTHERS PLAINTIFFS

VERSUS

REGISTRAR OF TRADE UNION & 4 OTHERS DEFENDANTS

RULING

The application dated 22nd October 2002 by way of Chamber Summons is seeking mainly three orders. These are orders sought in prayers 2, 3 and 4. There is also an order for costs to be provided for which is also sought. The three main orders sought are first, that the 2nd, 3rd, 4th, and 5th Defendants, their agents, and or servants by themselves or otherwise howsoever be restrained from taking over office or acting in any manner whatsoever as elected officials of SEAMEN UNION OF KENYA MOMBASA BRANCH pending the hearing and determination of this suit or application or until further orders of this court. Second order sought is that the 2nd, 3rd, 4th and 5th defendants, their agents, assignees and/or servants by themselves or otherwise howsoever be restrained from withdrawing any money or otherwise effecting any transactions in the Seamen Union of Kenya Bank Account No.204720872 at KCB Mombasa and operations of the said account be frozen pending the hearing and determination of this application or suit and the last main order sought is that the First Defendant be directed to de-register the 2nd, 3rd, 4th and 5th Defendants as newly elected officials of SEAMEN UNION OF KENYA MOMBASA BRANCH and to cancel the certificate of registration issued in their names.

The grounds for the same application are briefly that the elections held on 30th September 2002 were marred by a lot of irregularities and were in total breach of the election rules set out in the Constitution of SEAMEN UNION OF KENYA; that despite protests from the Plaintiffs, the first Respondent went ahead and unlawfully registered the 2nd, 3rd, 4th and 5th Defendants as duly elected officials of the Seamen Union of Kenya Mombasa Branch and issued certificate of registration; that the elections were carried out unprocedurally, unlawfully and in total contravention of the Trade Union Act; and that the persons elected on 30th September 2002 should not be allowed to take over the office since the said elections were illegally conducted and are thus null and void.

The application was supported by an Affidavit sworn by the first Applicant Salim Idd Mwasina and there were several annexures to the same Affidavit.

The 2nd, 3rd, 4th and 5th Respondents opposed the application and filed Replying Affidavit sworn by the 4th Respondent Abubakar Kilwa Omar on 31st October 2002. There were also several annexures to the same Affidavits. First Respondent did not file anything in opposition to the Application.

I have perused all the pleadings in this case. I have perused the Affidavits, the annexures and I have also considered them and considered the able submissions by the learned counsels who appeared before me.

First, the prayers 2 and 3 are badly drafted and the court is not able to know what the applicants really want. Prayer 2 is seeking injunction “pending the determination of the suit or the application or further orders of this court.” That prayer is not precise and clear. The law requires that an applicant should state clearly what he wants. If he wants restraining orders pending the determination of the suit, he should say so, if he wants restraining orders pending the determination of the application, the same should be specifically and clearly stated. Prayer 3 also has the same problem.

Secondly, I do agree with the learned Counsel for the Respondent that prayer 4 is misconceived in law. It is indeed seeking mandatory injunction against the First Respondent, which is a Government Department. The Government Proceedings Act Chapter 40 Section 16(1) is clear on that and no injunction, mandatory or prohibitory or order for specific performance can issue against the Government. If the applicants were serious that they wanted the registration of the 2nd, 3rd, 4th and 5th Respondents cancelled by the First Respondent, then they should have proceeded by way of Order 53 – i.e. They should have proceeded by way of Judicial Review; and not by way of plaint as was done here and certainly not by an application for mandatory injunction as has been done here.

Lastly, and in my humble opinion, the most serious aspect of this application is that the application is based on the Affidavit of SALIM IDD MWASINA sworn on 22nd October, 2002. A look at that Affidavit leaves one with no doubt in mind that the deponent was present at the scene where the disputed elections was being held. He did not depone on what he was informed. He deponed on what he allegedly saw, heard, felt, smelt, and tested i.e. on what he perceived with his senses. He states for example at paragraph 7 as follows:

“7. THAT the balloting papers were not brought inside the hall by the labour officers who were required to conduct the elections but they never turned up.”

One naturally gets an idea that he must have been inside the hall to witness that the balloting papers were not taken inside the hall. At the end of the affidavit, he says at paragraph 23 as follows:

“THAT WHAT is deponed to herein above is true to my own knowledge save as to matters deponed on information, the sources whereof have been disclosed and to matters deponed to on belief the grounds whereupon have been given.”

The matters deponed upon on information, sources of which information were revealed are matters at paragraph 16 and 19 . Matters deponed on belief are matters at paragraph 17. One would think that matters at paragraphs 4, 5, 6, 7, 9 and 10 are matters within his own knowledge as he never said they were matters deponed on information. However contrary to that, the Respondent has sworn an affidavit in reply to the affidavit of the deponent and in that Respondent’s Affidavit, the Respondent stated at paragraphs 7 and 8 as follows:

“7. THAT however, on the material day and place, the 1st and 3rd Applicants never showed up save for the 2nd Applicant who attended and vied for the position of trustee but was soundly beaten. (see the minutes of the Special Conference of 30th September 2002 marked AKO 6.”

8. THAT being the case, therefore the 1st and 3rd Applicants cannot be heard to claim knowledge of irregularities when they were not at the conference venue and more so, since they too refused to avail the balloting materials in their custody to deliberately sabotage the conference.”

These allegations by the Respondents were not challenged by the Applicants in any further Affidavits. Indeed at the time of hearing this application, the Applicants’ Counsel, when faced with that allegation could not refute it and did agree that the First Plaintiff who did swear the supporting affidavit was not at the venue of elections.

I find it difficult that the learned counsel for the Applicants allowed the first Applicant to swear such an Affidavit. Surely one would have expected the Applicant to depone to such facts as facts on information and to reveal the source of his information. That was not done and all I can feel is that the Applicants were set to mislead the court. These parts of the Affidavit, which are the main parts of the Affidavit cannot be treated as valid. If the counsel for the Respondent had drawn my attention to the same earlier, those paragraphs would have been expunged from the record.

The sum total of all this is that the Applicants are coming to court with unclean hands. The remedies of injunction are equitable remedies. He who comes for equity must come with clean hands. I need not go further than the decision of Ringera J in the case of Albert Mario Cordeiro vs. Cyperr Enterprises & Others HCCC No.2430 of 1996 . He said:

“It is common ground that the conditions for the grant of an interlocutory injunction are first, that the applicant must establish a prima facie case with a probability of success at the trial, secondly that an interlocutory injunction will not normally be granted unless the applicant can show that he will suffer an irreparable injury which cannot be adequately compensated in damages and thirdly , where the court is in doubt, the application should be decided on a balance of convenience (see GIELLA VS. CASMAN BROWN & CO. LTD (1973) E.A. 358. I must add that an injunction is an equitable remedy and accordingly it will not issue even if the necessary conditions are satisfied if it is proved to the court that the applicant is undeserving of equitable relief.”

I do agree fully with these sentiments which are now part of our law. I do feel the Applicants in this application are undeserving of an equitable remedy. I note with surprise that the First Plaintiff who claims to be the Acting Secretary General, and Third Plaintiff who claimed to be the Treasurer were not at the meeting when elections were carried out despite letters from the First Defendant which were all addressed to the First Plaintiff and advising him on how to convene the same conference.

If the two were not there who did they want to liaise with those conducting elections to ensure smooth elections? It does appear to me that the Respondents allegations against the Applicants attempts to sabotage the meeting cannot be termed as far fetched. Indeed they have basis. Why should they seek to gain from their ill plans to scuttle the meeting? Before I dismiss this application as I must do, I have perused the supporting Affidavit over and over again and I cannot see any evidence in support of prayer 3. Freezing an account of a union or a body corporate is not a small thing.

It is a serious and a draconian action which cannot be lightly taken for it may very well mean the end of the workers union as no union can effectively operate without funds. It means therefore that whoever is seeking such an action must be armed with full and valid evidence as no court will take such action without being fully satisfied that such a decision is warranted particularly at an interlocutory stage such as this. Here however, the Applicant has not even attempted to say why the account should be frozen. In my mind the prayer to stop Respondents from withdrawing any money from the account is a repetition as once prayer 2 is allowed then it goes without saying that the Respondents would not withdraw money from the union's account for they would have no capacity to do so. That is why I have concentrated my comments to prayer for freezing the account.

This Application has no merit. It is dismissed in its entirety. Costs to the 2nd, 3rd, 4th and 5th Respondents. Orders accordingly.

Dated and delivered at Mombasa this 26th Day of November 2002.

J. W. ONYANGO OTIENO

JUDGE

