

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL CASE NO. 78 OF 2001

ROSE NDUNGWA MULU & 2 OTHERS :::::::::::::::::::: PLAINTIFF

VERSUS

FRANCIS MUIA & 8 OTHERS :::::::::::::::::::: DEFENDANT

Coram: J. W. Mwera J.
10 Miss Mulwa Advocate for Applicant/Plaintiff
Adipo for Oraro Advocate for Respondent/1st – 7th Defendant
C.C. Muli

R U L I N G

On 6.6.2000 the three plaintiffs/Applicants filed a suit and also applied for injunction orders under O.39 rr.1, 2 Civil Procedure Rules against the first seven defendants who were said to be the officials elected to Makueni Branch, Kenya National Union of Teachers (KNUT) as officials. It was said, and this formed one of the grounds for the injunction, that that election went on for two days, 12th and 13th 20 April 2001 instead of one day (12.4.2001) as required by the KNUT constitution and approved by the KNUT national office. The 8th defendant was the returning officer at that election (a labour officer) while the 9th defendant, the registrar of trade union was brought in, apparently for accepting and registering the first seven defendants as branch officials.

As per the grounds in support of the application and the affidavits sworn by the 1st Plaintiff/Applicant, the court heard that it was contrary to KNUT Constitution for elections to be extended beyond the mandated day, here 12.4.2001, as the case was here. That the elections were concluded at 2.30 a.m. on 13.4.2001 and no KNUT National Council Authority backed up such extension; that voting procedures were breached and ignored including absence of vetting all present to allow only local teacher-members to vote. That security was lax and members, non-members etc. mingled freely at the voting venue in a manner that permitted double – voting and rigging. That there was no tight and proper fencing to ensure orderly voting. Miss 10 Mulwa further told the court that there was no tight control over ballot papers issued and the ballot boxes were open and so any papers could be stuffed in. That lights went out at some point that night and security of ballots was not assured. That the venue of the elections was changed without prior adequate notice – an aspect that confused and prejudiced the voting teacher – members. That the voting itself was delayed up to late afternoon by which time tired and impatient members had left the venue and gone home. There are several other complaints that the court heard. In all this, Miss Mulwa sought to make out a prima facie case for her clients so that the temporary injunction that issued in their favour on 6.6.2001 be confirmed.

Mr. Adipo for the 1st to 7th defendants/respondent had a contrary view. Before trying to respond to the claims by the plaintiffs, he started off with a principle of law regarding seeking prerogative orders with clean hands and candour. He then moved on to adopt and argue as per the affidavits in reply sworn by Benson Kithuku (2nd Defendant) an elected official and one Joseph Chirchir whom the court learnt was present at the election venue as an agent from the KNUT Headquarters Nairobi.

Mr. Adipo urged the court to dismiss the plaintiffs prayers on the basis that they had not disclosed that they had once filed some proceedings in Nairobi which were either thrown out or were withdrawn. To this, this court recalls that Miss Mulwa on 6.6.2001 when she got a temporary injunction, she alluded to such proceedings at Nairobi.

The court heard that the 9th defendant, had already registered the Makueni KNUT branch officials.

That was not refuted. That the election results were 10 announced at 12.30 a.m. on 13.4.2001. It was explained that actual election ended earlier but only the counting and preparing the result was accomplished at 12.30 A.M. 13.4.2001 – a matter which the plaintiff’s agents Julius Mbithuka and Kennedy Kyeva duly acknowledged. This was not disputed for they signed the “certificate” of the results (see BK3) at 12.30 A.M. as above. It was therefore untruthful of the plaintiffs to tell the court that elections ended at 2.30 A.M. on 13.4.2001.

As for the venue the court heard that it was initially set to be at Unoa Primary School. But on 11.4.2001 the outgoing branch office executive got a letter from the headmaster of that school – a day before the election on 12.4.2001 that the school 20 management was demanding Sh.15000/= for the use of the venue. That that money could not be paid in the time left and so the venue was switched to Catholic Multipurpose Hall sharing a fence with Unoa Primary School, and a notice of that change was pinned on the school gate for member – voters to note. This was not rebutted. Probably at the trial it shall be demonstrated that the change of venue did prejudice the voting exercise.

The claim that security was lacking was also slated for inquiry at the trial although the Respondents denied lack of it at the venue. The court further heard that indeed the 1st defendant Francis Muia was the 1st plaintiff’s running mate in the election and that so one wonders what rigging went on. Yes, indeed. After hearing both sides as per their submissions and pleadings this court is disinclined to confirm the injunction of 6.6.2001. A prima facie case is not made out at this point and if anything the claims raised are only fit for investigation with evidence at the trial – all of them.

On a balance of convenience the present Makueni KNUT branch office should be let to run the activities of the branch which no doubt has many members, although they are yet to be revealed to the court. In sum prayers refused with costs. Parties may arrange to process the suit for trial.

Orders accordingly.

Delivered on 5th July 2001.

J. W. MWERA

JUDGE