IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gicheru, Muli & Akiwumi JJ A)

CIVIL APPEAL NO. 167 OF 1993

BETWEEN

1. JOHNSON OGENDO

2. GEORGE MUCHAI.....APPELLANTS

AND

BENJAMIN K. NZIOKA & 5 OTHERS.....RESPONDENTS

(Appeal from the ruling and order of the High Court of Kenya at Nairobi (Mr Justice Shields) dated the 10th November, 1993

in

H C Miscellaneous Cause 762 of 1993)

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JUDGMENT

On 2nd July, 1993, it is alleged, the Governing Council of the Central Organisation of Trade Unions, Kenya, (hereinafter referred to as "COTU"), held a meeting at the Kenyatta International Conference Centre, at which the then office holders of COTU were removed and replaced by others including the appellants, Johnson Ogendo and George Muchai. The then office holders of COTU were the six respondents who included Jolly Mugalla as Secretary General of COTU, Boniface Munyao as Deputy Secretary General of COTU and George Odiko as Assistant Secretary General of COTU. These three offices of Secretary General, Deputy Secretary General and Assistant General of COTU, are offices of some importance for out of the eleven offices of COTU as set out in rule 6 of the COTU Constitution and Rules which formed part of the evidence before the superior court, they are, unlike the other seven offices which are to be filled by secret ballot every five years at a meeting of the Governing Council of COTU, to be filled by persons appointed by the President of Kenya each, from a panel of not more than three names submitted to him by the Governing Council after selection by secret ballot. The President is further empowered on the principle of "he who hires can fire", to revoke all or any of the persons he appoints to fill what one may refer to as the three presidential appointed offices. But rule 6 of the COTU Constitution and Rules also grants to the Governing Council the limited power not to appoint, but to remove all or any of the presidential appointed office holders for stated cause.

At the meeting of the Governing Council on 2nd July, 1993, the then presidential appointed office

holders, namely, Jolly Mugalla, Boniface Munyao and George Odiko, were purportedly removed from office and replaced by Johnson Ogendo, George Muchai and Ali Mohammed in their respective offices, presumably as presidential appointees. The other non-presidential appointed office holders were also purportedly replaced

by other persons.

As required by section 38(2) of the Trade Union Act (hereinafter referred to as "the Act"), the Registrar of Trade Unions, whom we shall henceforth refer to as "the Registrar", is to be notified of the change in the officers of COTU that had allegedly taken place on 2nd July, 1993. On 5th July, 1993, the Registrar was presented with a notice designated as form (N), in accordance with s 38(2) of the Act, notifying him of the change of the officers of COTU. The Registrar was then required under that same section, subject to the provisions of subsections (4) and (5), to register the change. Subsection (4) which is relevant to the matter is as follows:

"(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".

Before the Registrar could register the new change of officers of COTU, the respondents, through their advocates, wrote to him objecting strongly to the registration of the change of officers of COTU. This letter set out various substantial grounds for the objection. The Registrar then in purported compliance with section 38(4) of the Act carried out an inquiry as to the validity of the change of officers and came to the conclusion that the change of officers had been validly accomplished and registered the change on 5th July, 1993.

The respondents then in High Court Misc Cause 762 of 1993, applied to the High Court for an order of *certiorari* to quash the decision of the Registrar to register the change of officers of COTU on the ground, *inter alia*, that the Registrar in reaching his conclusion to register the change of officers of COTU, had not complied, as he was duty bound to do, with the Rules of Natural Justice. The parties directly affected by the application were given as the Registrar and COTU. The application was supported by the affidavit of Jolly Mugalla, the third respondent, to which the Constitution and Rules of COTU were annexed. Replying affidavits were filed by the Registrar and by the second appellant, George Muchai, who was at the time, the newly registered Deputy General Secretary of COTU. At the beginning of the hearing of the application before Shields, J, on 4th October, 1993, Dr Gachuki with Miss Weru appeared for COTU and Mr Oyalo for the Registrar. Upon it being pointed out to the learned judge by Dr Gachuki that the present office bearers of COTU should, as interested parties, be served with the application, he then adjourned the hearing of the application until 18th October, 1993, and directed that

the respondents serve the application on the office bearers of COTU as registered on 5th July, 1993. The office bearers of COTU were duly served and on the return date of 18th October, 1993, Miss Weru appeared for COTU, Mr Oyalo appeared for the Registrar and Messrs Maosa and Mungu appeared respectively for interested parties Ali Mohammed, the Assistant Secretary General of COTU and Dicken Ogoti the third trustee of COTU. An adjournment was applied for on behalf of Dicken Ogoti. The learned judge in refusing to exercise his discretion in favour of that interested party, employed the following words which were to set the tone of his subsequent ruling not to hear those interested parties who were presidential appointed office holders:

"I am of the view that the only question I have to consider is whether the Registrar did his job properly. If he did not, *certiorari* will issue. If he did *certiorari* will not issue. I do not think the interested parties are in any way inconvenienced so I refuse the application for adjournment."

The next application for adjournment that same day, was made by Miss Weru on the ground that her leading counsel Dr Gachuki had chosen to travel to England rather than come to Court. This application was refused. COTU appealed against the learned judge's refusal to grant the adjournment and sought stay of that order of the High Court. In its ruling in this matter, namely, *Central Organisation of Trade Unions*

(Kenya) v Benjamin K Nzioka and 5 others Civil Application No NAI 249 of 1993 (108/93 UR), this Court, constituted by Apaloo CJ, Gicheru and Tunoi, JJ A, upheld the refusal of the learned judge to grant the second adjournment sought. It is noteworthy that in its ruling, in this matter, this Court observed albeit, *orbiter*, with respect to the proceedings before the High Court, that:

"It is to be noted that it was the Registrar's action in registering the new officers that was being contested by the present respondent".

The next day, 19th October, 1993, Mr Jaffer, without specifically stating on whose behalf he was appearing, told the learned judge that he wished, in due course, to apply to be heard under o 53 r 6 of the Civil Procedure Rules on behalf of interested parties. This wish was duly noted by the learned judge. On 27th October, 1983, when hearing resumed, Mr Jaffer made it clear that he was appearing for two interested parties, namely, the appellants. The learned judge then ruled refusing to hear Mr Jaffer. But before dealing with the learned judge's ruling on this issue, it would be convenient to consider o 53 r 6 under which Mr Jaffer sought to be heard.

This order is in the following terms:-

"On the hearing of any such motion as aforesaid, any person who desires to be heard in opposition to the motion and appears to the High Court to be a proper person to be heard shall be heard, notwithstanding that he has not been served with the notice or summons, and shall be liable to costs in the discretion of the court if the order should be made". (underlining supplied)

It seems to us that under o 53 r 6, the High Court is first of all, given the discretion to hear an interested party only if it appears to the Court to be a proper person to be heard. The question that will therefore have to be answered is whether the learned judge exercised that discretion properly in refusing to hear Mr Jaffer.

The issues before the learned judge were, whether the Registrar, after receiving the objection of the respondents, exercised his functions under the Act in accordance with the Rules of Natural Justice or not, in determining as he did, that he should register the new office holders of COTU and whether for this purpose, it would be necessary for him to hear the appellants on a matter which was entirely concerned only with the manner in which the Registrar exercised his statutory functions? The learned judge did not think so. In his ruling refusing to hear Mr Jaffer, the learned judge as he had observed in his earlier ruling already referred to, reiterated that the matter before him was purely to determine whether the Registrar acted properly or otherwise in coming to the decision that he should register the notice of change of the officers of COTU and that the appellants were not in that respect, really interested parties. It will be remembered that this was also the issue, which this Court in its ruling in the case of *Central Organisation of Trade Unions (Kenya) vs Benjamin K Nzioka and 5 Others*, Civil Application No NAI 249 of 1993 (103/93 UR) *supra*, had noted, was before the High Court. The ruling of the High Court in refusing to hear Mr Jaffer was as follows:

"The 2 persons for whom Mr Jaffer appears are alleged to be officers whose office is filled by H E The President. Under rule 6(b)(ii) of the COTU Constitution. They do not hold office because they have been registered by the Registrar of Trade Unions under the Trade Union Act. They accordingly are not concerned with whether the Registrar exercised his powers under section 38 of the Act correctly. They accordingly have no interest in the application for *certiorari*. So I must decline to hear Mr Jaffer".

The proceedings continued:

"Mr Jaffer - I seek leave to appeal.

Court – I think it is just an academic point. I refuse leave."

Before moving to the next stage of the proceedings before the High Court, it is also worth noting that it was not the conduct of the appellants which was under investigation by the learned judge and for which

they could be condemned, but rather that of a different person altogether, namely, the Registrar, with respect to his actions under the Act. So, whilst in such circumstances, it would be necessary to hear what the Registrar has to say, the same necessity will not apply to what may be submitted on behalf of the appellants in the proceedings before the High Court whether the appellants will be affected by the decision of the learned judge or not, if such submissions would have no relevance to the question whether the Registrar acted in breach of the Rules of Natural Justice or not. In the circumstances, it cannot be said that the learned judge applied wrong principles of law or acted in breach of the Rules of Natural Justice in refusing to hear submissions on behalf of the appellants whose conduct the learned judge was not being asked to condemn and submissions on behalf of whom can have nothing to do with the crucial issue whether the Registrar acted in breach of the Rules of Natural Justice or not, in not hearing the respondents before determining to register the change of officers of COTU.

After the learned judge refused to hear Mr Jaffer, he proceeded to hear submissions on behalf of the respondents and other interested parties. Then on 10th November, 1993, he gave his judgment in which he held that the Registrar had not properly exercised his discretion to register the notice of change of the officers of COTU because he had, *inter alia*, in breach of the Rules of Natural Justice, and this is not denied, not heard the respondents. No evidence by or submission on behalf of the appellants would have changed this conclusion. The learned judge then issued an order of *certiorari* to bring into this Court "the decision of the Registrar registering the notice of change of the officers of COTU dated 2nd July, 1993, for the purpose of quashing it". The effect of this was that as from 10th November, 1993, the decision of the Registrar in its entirety to register the notice of change dated 2nd July, 1993, whereby, the respondents had been removed from the register of office bearers of COTU, had been quashed and the status quo *ante* maintained.

This judgment of Shields, J prompted the first appeal in this matter. It

was an appeal purportedly brought by COTU at the instance of Johnson Ogendo and George Muchai who had at the time, ceased as a result of the judgment of Shields, J to be office holders of COTU. It came up for hearing by this Court, constituted by Cockar, Omolo & Akiwumi, JJ A in the case of *Central Organisation of Trade Unions (K) v Benjamin K Nzioka and 5 Others* Civil Appeal No 166 of 1993. In that appeal, this Court had no difficulty in coming to the conclusion that the Registrar had been guilty of a breach of the Rules of Natural Justice when considering the objection of the respondents to the registration of the notice of change of officers of COTU. We are still in entire agreement with that conclusion.

The very same Johnson Ogendo and George Muchai are the appellants in the present appeal which is against the ruling of Shields, J of 27th October, 1993, in which he declined to hear Mr Jaffer on behalf of the appellants. The appellants now seek by a side wind, what they failed to achieve in the first appeal *Central Organisation of Trade Unions (K) v Benjamin K Nzioka and 5 Others* Civil Appeal No 166 of 1993 *supra*, namely, the setting aside of the order of *certiorari* issued by Shields, J after hearing the judicial review proceedings on its merits and concluding that the Registrar had acted in breach of the Rules of Natural Justice. In the present appeal, the appellants seek to set aside the ruling of Shields, J declining to hear submissions on behalf of the appellants, the rehearing of the application for *certiorari*, and the reinstatement of the notice of change of officers of COTU registered by the Registrar on 5th July, 1993.

The appellant's grounds of appeal can be summarised as follows:

-that the learned judge erred in law in declining to hear the appellants whom he had directed to be served with the application for judicial review;

- the learned judge erred in law and fact in finding that the offices held by the appellants were not as a result of registration by the Registrar and that the appellants were not interested parties and erred in making orders against the interest of the appellants in his judgment;

- that the learned judge erred in making contradictory orders rendering the issue of *certiorari* unclear;

- that the learned judge erred in law in failing to keep a proper record of the proceedings before him; and that the learned judge in refusing an adjournment on 26th October, 1993, had conclusively decided the matter against the appellants in advance of the hearing of the judicial review proceedings and had shown bias against the appellants also in awarding costs against them.

Mr Jaffer for the appellants did not, however, make submissions on all

these grounds. He argued that the learned judge, having directed that the office bearers of COTU be served with the application for judicial review, he was himself, ironically guilty of a breach of the Rules of Natural Justice in declining to hear counsel appearing for the appellants whose positions would be affected by the decision of the learned judge in the judicial review proceedings. But as already shown, the learned judge is, under o 53 r 6, only obliged to hear such persons as he thinks are proper persons to be heard in opposition to the application for judicial review. The question in issue in the application for review was no more than whether the Registrar exercised his statutory powers properly. The determination of that question whether the Registrar was in breach of the Rules of Natural Justice in not hearing the respondents who had protested against the registration of the notice of change of officers, can be achieved without submissions on behalf of the appellants. The nature and scope of judicial review is defined in the *English Supreme Court Practice* 1993 vol 1 p 845 significantly as:

"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".

It is inconceivable that the submissions to be made on behalf of the appellants would be of assistance to the learned judge in determining whether the decision making process adopted by the Registrar was flawed or not. Furthermore, the Principles of Natural Justice which was derived from the Latin maxim "*audi alteram partem*" are only applicable where the act of a party is being sought to be condemned, and fair play requires that he be given a hearing. No action of the appellants was the subject of attack; it was only that of the Registrar. In these circumstances also, the maxim "*audi alteram partem*" would hardly apply to the appellants. It must not also be forgotten what has been observed earlier, that the decision making process of the Registrar is quite a different matter from whether the appellants had been properly appointed by the President to their respective offices. Whether the previous presidential appointed office holders of COTU had been properly removed by the Governing Council is also, of course, not relevant to the issue whether the Registrar had acted properly. We are of the view that the related grounds of appeal must fail, no matter whether, as in this case, the learned judge, upon application by Mr Gachuki, had directed that the new office bearers of COTU be served with the application for judicial review. He had not by that direction deprived himself of his discretion to determine under o 53 r 6 who should be heard by him. As we have already stated, nothing submitted on behalf of the

appellants could have changed the position found by the learned judge that the Registrar had not heard the respondents who had objected to the election of the new officers of COTU before deciding to register them. His refusal to hear Mr Jaffer on behalf of the appellants was not only a proper exercise of his discretion but would also have been an exercise in futility. The refusal to hear counsel for the appellants cannot in the circumstances, amount to any more than a matter of mere technicality which cannot be allowed to set at nought the doing of substantial justice and the arrival at a just result which, in our view, is what had occurred.

We think that attention should also be drawn to section 79A of the Civil Procedure Act which is in the following terms:-

"No decree shall be reversed or substantially varied on account of any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the court."

When considering the point whether mere technicalities should stand in the way of striving to do substantial justice, Apaloo JA, as he then was, had this to say with which we entirely agree and which bears reproduction in *extenso,* in his dissenting judgment in the Court of Appeal case of *Ndegwa Wachira v Ricanda Wanjigu Ndajeru* Civil Appeal No 449 of 1984:

"At all events, it seems to me the appellant is merely standing on bare technicalities. Nobody has a vested right in procedure and a Court, must, at least, at the present day, strive to do substantial justice to the parties, undeterred by technical procedure rules. As is often said, Rules of Procedure are good servants but bad masters. These Rules have their origin in England and the philosophy there is to move from form to substance. Lord Denning, the celebrated English judge has said *ad nauseam*, that technicalities are a blot in the administration of justice. English Courts have on numerous occasions refused to set aside process for technical irregularities. See *Macfov v United Africa Co Ltd* [1962] AC 152, *Pontin v Wood* [1962] 1 QB 594 to mention only two.

In *Pritchard Deed* [1963] 2 WLR Lord Denning, regretting a technical decision by the majority of the Court said:

'My brethren take a different view. They think the defect is fatal and the widow must be driven from the judgment seat without a hearing. I greatly regret that this should be so.

Quite recently in *Pontin v Wood*, Hoveyd Pearce, LJ recalled the proud boast of Bowen, LJ that "it may be asserted without fear of contradiction that it is not possible in the year 1887 for an honest litigant in Her Majestey's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation.'

It would be strange if the principle today were otherwise in this or any of the newer commonwealth countries where professional and judicial standards are less high than in England.

In the same case, Upjohn LJ who wrote the leading judgment, examined the cases in which defects or irregularities were held to be fatal and those in which they were not and proceeded:

> 'I do not think that the earlier cases or the latter *dicta* upon them prevent me from saying that the law when properly understood, is that order 70 applies to all defects in procedure unless it can be said that is fundamental to the proceedings. A fundamental defect will make it a nullity. The Court should not readily treat a defect as fundamental and so a nullity and should be anxious to bring the matter within the umbrella of order 70 when justice can be done as a matter of discretion, still bearing in mind that many cases must be decided in favour of the person entitled to complain of the defect *ex debito justitiae*.
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> I think that exemplifies the present liberal approach to breaches of Procedure Rules."

Mr Jaffer next argued that the learned judge's record of the judicial review proceedings was incomplete. It is true that the record of proceedings is cryptic and somewhat scanty, but nonetheless, understandable. What is more, this very same record was presented to this Court in the two cases already referred to namely, *Central Organisation of Trade Unions (Kenya)*

v Benjamin K Nzioka and 5 others Civil Application No NAI 249 of 1993 (108/93 UR) and *Central Organisation of Trade Unions (K) v Benjamin K Nzioka and 5 others* Civil Appeal No 166 of 1993, *supra*, and in both cases, this Court did not find the record of proceedings of the High Court unhelpful or embarrassingly devoid of details as to be of no help to it. We think that this ground of appeal must also fail.

Mr Jaffer next submitted that the appeal must be allowed because the learned judge had shown impatience with the appellants refusing to grant an adjournment sought by them in the course of the judicial review proceedings. The record of proceedings shows that this refusal to grant the adjournments sought by some interested parties including the appellants, and COTU, was in the wake of various attempts on behalf of some of the interested parties, the appellants and COTU to delay the hearing of the judicial review proceedings and in respect of which, this Court, in its ruling in the case of *Central Organisation of Trade Unions (Kenya) v Benjamin K Nzioka and 5 others* Civil Application No NAI 249 of 1993 (108/93 UR), *supra*, exonerated the learned judge of the High Court.

Mr Jaffer lastly, argued that his clients were debarred from raising various substantial issues namely, that the title of the judicial review proceedings was wrong, that no leave, *ex parte*, had been obtained by the respondents before the hearing of the judicial review proceedings, and that the learned judge had relied on evidence which was not before him, concerning the appellants being holders of presidential appointed offices. But the Constitution and Rules of COTU which set this out were before the learned judge, having been annexed to the affidavit of the 3rd respondent in support of the application for judicial review. As regards the title of the application for judicial review, we see nothing wrong with it. Whilst the case of *Farmers Bus Service v Transport Licensing* Appeals Tribunal [1959] EA 779 CA-K may have had some relevance prior to the replacement of actions by prerogative writs with proceedings for judicial review, it does not apply to proceedings brought now under o 53 of the Civil Procedure Rules which was inspired by the replacement in 1977 in England of the former prerogative remedies of *certiorari*, prohibition and *mandamus* by the new and comprehensive public law remedy of judicial review.

But do our Rules of Procedure require that leave must first be obtained *ex parte*, by the applicant for judicial review? Order 53 itself, after its recent hurried amendment in 1992, is silent on the issue, but this order, read together with the Law Reform Act, seems to suggest that leave should first be obtained. The English Practice in this regard is set out in

paragraph 53/1 – 14/1 page 841 of the *Supreme Court Practice* 1993 Vol 1. After stating that an application for judicial review must be preceded by an application for leave to move for judicial review, the commentary goes on to state:

"The leave application will normally be dealt with initially by a single judge without a hearing, and a copy of the order made by the single judge will be sent to the applicant. .... If leave is granted, the applicant then institutes a substantive judicial review application ....." (underlining supplied)

This very formal technical procedural requirement fortifies our view that an omission to comply with it, should not cause the exercise of a jurisdiction on the merits of a matter which the High Court undoubtedly enjoys, to be rendered a nullity.

It has not been contended that the High Court has no jurisdiction to hear applications for judicial review and where, as in this case the High Court has heard the application for judicial review, which it has jurisdiction to hear, on its merits, it would be yielding to a technicality to say that the *inter partes* hearing which the High Court has undoubted jurisdiction to hear, should be set aside merely because an unimportant procedural step had not been taken and so, render null and void the exercise of a jurisdiction which the High Court is endowed with. See also the excerpt from the judgment of Apaloo, JA quoted above in the *Ndegwa Wachira* case, *supra*. The appeal on these grounds also fails.

Apart from anything else, it must not be forgotten that this Court upheld the decision of the High Court in issuing an order of *certiorari* to quash the decision of the Registrar. As is well known, a Court of equity whose jurisdiction the appellants are invoking, will not grant a relief which serves no practical purpose or as is sometimes said, "equity will not act in vain". We cannot see how we can accede to the contention of the appellants, when this Court has already, in the appeal case of *Central Organisation of Trade Union (K) v Benjamin K Nzioka and 5 others* Civil Appeal No 166 of 1993 *supra*, not only upheld the decision of the High Court to issue the order of *certiorari*, but had also, in its judgment, directed the Registrar, if he had not yet done, so, to give effect immediately to the order of *certiorari* issued by the learned judge, and which direction had been complied with by the Registrar.

We are not too certain whether the learned judge was right in ordering

that the appellants, after he had refused to hear submissions on their behalf and had gone on to conclude the proceedings without hearing such submissions, should pay costs. We think that he was wrong.

We have considered the authorities and submissions cited and made in the present appeal and have come to the conclusion that for the reasons we have set out hereinbefore, this present appeal, except that we allow the appeal against the order of the learned judge that the appellants should pay costs, must be

dismissed with costs.

Dated and Delivered at Nairobi this 17th day of June 1994.

J.E.GICHERU

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JUDGE OF APPEAL

M.G.MULI

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JUDGE OF APPEAL

A.M.AKIWUMI

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JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR