



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT AT BUNGOMA

ELR CAUSE NO. E001 OF 2021

DAVID S. WAMBASA PLAINTIFF

VERSUS

JEREMIAH INGALIA AKHONYA1ST RESPONDENT

NEMIAH MUCHINA2ND RESPONDENT

GORDON OGADA3RD RESPONDENT

KENYA UNION OF SUGAR PLANTATION & ALIED WORKERS

COUNTY LABOUR OFFICER KAKAMEGA.....5TH RESPONDENT

REGISTRAR OF TRADE UNIONS 6TH RESPONDENT

JUDGMENT

1. The Plaintiff an unsuccessful contestant for position of Branch Secretary in KUSPAW (Kenya Union of sugar Plantation and allied Workers) Kabras branch elections held on 16th January 2021 filed this suit challenging the outcome of the said elections on grounds of non – compliance, manipulation, fraud and sought the following reliefs against the defendants jointly and severally:-

(a) A declaration that the election of the Kabras Branch of KUSPAW held on 16/1/2021 was a sham, fraudulent for having been conducted against the law and therefore null and void.

(b) An order annulling the declaration by the 5th Defendant that the first Defendant and other officials had been validly elected.

(c) An order compelling the 5th Defendant to carry out fresh election of the Kabras Branch of KUSPAW in accordance with the law.

(d) That the defendant be compelled to pay costs of the suit and interest .

The Plaintiff swore a verifying affidavit on 2nd March, 2021 filed with the Plaint. In addition the plaintiff filed his statement dated 1st March 2021, list of documents dated 1st March 2021 and produced the said documents at the hearing.

2. The 4th Defendant entered appearance on the 17th May, 2021 vide Law firm of P.D Onyango & Company Advocates.

3. The 2nd defendant entered appearance in person on the 22nd June 2021.

4. The 1st Defendant entered appearance in person on the 22nd June 2021.

5. The 3rd Defendant entered appearance in person on the 22nd June 2022.

6. The 5th and 6th Defendant did not enter appearance.

7. The 2nd and 3rd Defendants filed Notice joint Notice of Preliminary Objection dated 28th June, 2021 under Order 2 Rule 15 of the Civil Procedure Rules and Employment and Labour Relations Court Rules 2016 on the following grounds:-

“ That the plaint dated 1st march 2021 is fundamentally and inerrably defective and in contravention of order 2 Rule 15 of the Civil Procedure Rules 2010 as it discloses no reasonable Cause of action against the 2nd & 3rd Defendants and the same should be struck out with costs to the 2nd and 3rd Respondents”.

The Preliminary Objection is considered together with the suit on the Judgement.

8. The 1st Defendant filed statement of defence dated 25th June, 2021 together with a replying affidavit sworn by himself on the 25th June 2021 and annexed documents.

9. The 4th Defendant did not file any pleadings despite filing a memorandum of appearance on 17th May, 2021.

10. The Court heard the viva voce evidence of the parties on the 3rd November 2021. The Claimant gave sworn testimony produced documents and was cross -examined by the 1st, 2nd and 3rd Respondents and closed is case. On same day the defence called the 1st defendant who testified and produced documents and was cross-examined by counsel for plaintiff and defence closed.

11. The parties filed written submissions as directed by court. The Plaintiff's written submissions dated 10th November 2021 by BS Advocates LLR are filed on 17th November 2021. The 1st, 2nd and 3rd defendants filed joint written submissions dated 30th November 2021 and filed on 2nd December 2021.

DETERMINATION

12. Issues for determination .

- (i) Whether the elections of KUSPAW Kabras Branch held on the 16th January 2021 were in compliance with the KUSPAW constitution .
- (ii) Whether the said elections complied with the elections directions contained in Exhibit letter dated 25th September 2020 by the Registrar of Unions.
- (iii) Whether the said elections were free and fair.
- (iv) Whether the plaintiff is entitled to reliefs sought.

The law on election of trade Union officials

13. Section 34 of the Labour Relations Act of 2007 provides for the election of officials of a trade union as follows:-

“34 (1) The Election of officials of a trade union, employees organization or federation shall be conducted in accordance with their registered constitutions.

(2) The Constitution of a trade Union, employers Organization or federation shall :-

(a) Not contain a provision that discriminates unfairly between incumbents and other candidates in elections and

(b) provide for the election, by secret ballot, of all officials of a trade union at least once every five years.

(3) Notice of the election of officials under this section shall be given to the Registrar in the prescribed form within fourteen days of the completion of the election.

(c) Disputes arising from or connected directly or indirectly to, election held under this section may be referred to the industrial court.

(d) The Registrar may issue directions to a trade Union, employer's organizations or federation to ensure that elections are conducted in accordance with this section and their respective constitutions”.

Plaintiff's Case in summary

14. The Plaintiff adopted his witness statement dated 1st March, 2021 as his evidence in chief. The Plaintiff is a member of KUSPAW a

trade union in the sugar industry in West Kenya Branch since 2011. On 16th January 2021 branch elections were held for Kabras Branch where he contested as a branch Secretary against two participants being the 1st Defendant and one Duncan Muya. That he garnered 81 votes. Duncan Muya 4 votes and the 1st Defendant 223 votes and 5 were spoilt. The Plaintiff was of the view that the elections held on 16th January 2021 were not free and fair, violated Unions Constitution and the Labour Relations Act and that the 1st and 5th Defendants connived to rig the election against the wishes of the majority for adding 142 non-eligible votes to the list who were neither members of the Union nor employees of West Kenya Sugar Company. That an updated list was not availed to the 5th Defendant within 60 days before the election as required by the law, the 5th Defendant colluded to preside over a fraudulent election and declared the 1st Defendant victorious even when he had protested. That the election was not held in a level playing ground.

The Defence Case

15. The 2nd and 3rd Defendants filed a Preliminary Objection to effect no reasonable cause of action was disclosed against them. The 1st Defendant in replying affidavit sworn on 25th June 2021 produced the circular dated 25th September 2020 by Registrar declaring the Country wide elections. He stated that KUSPAW held all branch elections on 16th January 2021 and Kabras Branch elections were held at WEKO grounds in compliance with the Union Constitution exhibit (JIA 02). The elections were for 6 branch officials and 6 Committee members of which he contested for branch Secretary and worn (JIA 03 elections results).

16. The 1st Defendant states that the participation in the impugned election was strictly limited to eligible members who had paid Union dues either through check off system or through direct payment to the Union as per Section 52 of the Labour Relations Act. Section 52 of the Labour Relations Act Unions permits payment of dues by member of trade union directly to the trade union. The 1st Defendant avers that the plaintiff was present and had agents at WEKO grounds all day and left after announcement of results without rising any complaint. That the exercise was conducted in presence of police who would have dealt with any fraud. That there is no legal or constitutional requirement for members register to be availed to the Public and further no evidence produced by plaintiff on how the 1st Defendant convened with the 5th Defendant to rig the election.

DETERMINATION

17. On Whether the KUSPAW elections for Kabras Branch held on 16th January 2021 were in compliance with KUSPAW Constitution; Whether there was compliance with Registrar Directions and Whether the said elections were free & fair .

18. The Plaintiff stated the particulars of non- compliance in paragraph 8 of the plaint and the court considered them as follows:-

(i) Failing to avail to the County Labour Officer and the Public an updated Member Register 60 days prior to the date of elections.

It is trite Law that he who alleges must prove. This is consistent with the provisions of the Evidence Act. Section 108 provides that the burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given or either side. In this case it is the Plaintiff. Section 109 - states that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence unless it is provided by any law that the proof of fact shall lie on any particular person. It is the opinion of this court that the burden of proof of the particulars of non-compliance, manipulation and fraud under paragraph 8 of the plaint lies with the plaintiff.

19. The court finds that the plaintiff did not place any evidence before court on the alleged non -compliance. On the allegation of the introduction of 142 non -eligible members who are not employees of West Kenya Sugar Company and who allegedly are not members of the Kabras KUSPAW Branch to participate in the elections, the Plaintiff informed the court the non-eligible list comprised of people not on payroll and were drawn from RMS, &HMS as employers (Exhibit No. 4). The Plaintiff produced a letter of complaint to the 5th Defendant dated 14th December 2020 (page 37 of Claimants bundle) complaining of introduction of these members. The Plaintiff said that according to the Union Constitution they ought to have been members 13 weeks prior to be eligible to vote and the 142 were not qualified for non contribution from 13 weeks prior. That they were not employees of West Sugar Kenya Ltd where he worked.

20. During cross examination, the Plaintiff confirmed that it was not true he contested for Secretary General . The Plaintiff said that he was present during the elections and that every candidate had an agent. That the Plaintiff had 2 agents and there was security on ground and there was no fighting. That he was present during the counting and he got 81 votes and that 1st Defendant got 223 in post of branch secretary and this he heard at the announcement . He did not have the results document. That he did not sign despite being called by the presiding officer to sign. The Plaintiff confirmed that the Constitution of the Union did not restrict membership to West Sugar Kenya Ltd.

21. That Rule 3 (A) defines membership to be employees within the Sugar Sector and further confirmed the impugned 142 members to be within Rule 3 (a) of the Union Constitution. The Plaintiff confirmed that the exhibit 4 by 1st Defendant indicated the 142 had paid membership dues directly to the Union. The Plaintiff confirmed that exhibit 3 "Genuine list" were all employees of West Sugar Kenya Ltd. The Plaintiff confirmed that in his campaigns he concentrated on the list with West Sugar Kenya Ltd Members only. The Plaintiff confirmed that in his letter of 14th December 2020 he had informed the Registrar that these 142 people were under different employers and met threshold of joining Union and being 100 in numbers they should sign recognition agreement and proceed to hold branch elections.

22. The Plaintiff admitted he wanted them to form own branches. The Plaintiff told the court he had visited the branch before elections for the Register but did not have any written document. He said he wrote to the Registrar but letter was not produced. The Plaintiff told the court that Rule No. 3 (b) of the Constitution required members to have paid COTU & KUSPAW dues and said the rule was about membership and not voting.

23. The plaintiff told the court that Rule 19 (b) of the Union Constitution required a member to be eligible to vote had to have paid dues

from 13 weeks. The Plaintiff confirmed to be eligible to vote one had to produce payslip or receipt for the Union and that was what was required under the Constitution.

24. The Plaintiff confirmed those so identified were legitimate voters. The Plaintiff confirmed that he did not know whether the 142 had been paying dues directly. The plaintiff confirmed the election were peaceful and he did not see anyone trying to steal votes. The Plaintiff confirmed that he had not called his agents as witnesses and had not picked the results from the presiding officer. The Plaintiff denied being sponsored by West Sugar Kenya Ltd to block non-employee members.

25. The Plaintiff confirmed the lists he produced were persons on Payroll at West Kenya Sugar Kenya in that December and the list of persons who paid dues directly and that the lists were not the documents used to vote. On cross examination by 3rd Respondent, the Plaintiff told the court that he was not aware of a court case ordering RMS to deduct dues of workers. On Re-examination the Plaintiff told the court he could not access the Branch office to access to written results.

26. The Plaintiff was emphatic the problem with the 142 members was eligibility under Rule 3 of the Union Constitution. On eligibility to vote Rule 3 (d) of the KUSPAW union Constitution provides in part that “No member shall be eligible for voting in any meeting of the Union if the arrears of his contribution to the Union exceed three months. The Plaintiff also relied on Rule 19 (b) of the Union Constitution which provides:- “No member of the Union shall be eligible to vote on any matter if his months subscriptions are more than 13 weeks in arrears when a member is under suspension in terms of this constitution”.

There was no evidence produced that the persons in the so called non-eligible list were in arrears or under suspension under Rule 19 (b). It was established that for one to vote they had to produce payslip as evidence of deduction of dues or receipt of the Union on direct payment. There was no dispute that this was the procedure followed at the impugned elections. The Plaintiff admitted to having agents at the said elections who he chose not to call as witnesses.

27. The Plaintiff admitted the elections were peaceful and each candidate had an agent. The Plaintiff also admitted that the voters should have been drawn from his employer West Sugar Kenya Ltd and this is also expressed in his letter to the Registrar of 14th December 2020. The Union Constitution membership is not limited to West Sugar Ltd.

28. The Court then concludes that the persons who voted in the said elections were qualified voters. on the qualification of the 1st Defendant, the plaintiff alleged discrimination. The 1st Defendant was the incumbent branch secretary. Section 34 of the Labour Relations Act provides that the Constitution of a trade Union should not contain a provision that discriminates unfairly between incumbent and other candidates in the elections. The Plaintiff did not plead or prove which part of the Union Constitution violated that provision or how he was discriminated against. The Register of voting was done by the national office and sent to the (5th Defendant) Labour officer who was the returning officer at said elections.

29. The Plaintiff Counsel questioned the qualifications of the 1st Defendant as incumbent during cross-examination. That issue was not pleaded and hence the 1st Defendant was not accorded opportunity to respond to the allegation. Parties are bound by their pleadings and the court finds that this was an ambush and places no weight on the question.

30. It was established the elections were peaceful and no lota of evidence was placed before the court on the alleged fraud or connivance between the 1st Defendant and the 5th Defendant. There was no evidence of request of the undated voter's register from the 5th Respondent who was the Returning officer or even the Union National Officer which prepared the register. By letter of 14th December 2020 it appears plaintiff was aware existence of direct paid members. There was no deliberate effort on the part of the plaintiff to obtain the register to be used at the voting before the scheduled election. The court also finds that there was no legal obligation to provide the register to contestants under Union Constitution though the right to access information is upheld. The court did not find evidence of request for the updated register.

31. The Plaintiff did not call any witness to collaborate his allegations on issues of lack of level playing ground and no evidence was placed before the court. The court found the persons in the alleged non-eligible list to were paid up members directly which is allowed under Section 52 of the Labour Relations Act. The court is satisfied that the said elections held on 16th January 2021 of the Respondent Kabras Branch was free and fair and in compliance with the Respondent's Constitution as directed by the Registrar under the letter dated 25th September 2020. The said elections were conducted by the 5th Defendant and not the 1st Defendant the incumbent Branch Secretary. The court upholds the definition of free and fair elections in the decision of *Supreme Court of Uganda Rtd. Col Dr. Kiza Bisigye -vs- Yoweri Kaguta Museveni and Electoral Commission* where the court defined free and fair elections to be where, inter alia, the electoral process is free from intimidation, bribery, violence, coercion and results are announced in good time. The said decision is cited in paragraph 106 by *Supreme Court of Kenya in Raila Amolo Odinga & Another -vs- Independent Electoral and Boundaries Commission & 2 others (2017) eKLR*.

32. There was no evidence placed before the court on the lack of compliance on directions on updated register. The Plaintiff appears to hypothesize. At Paragraph 12 of his submissions it is stated “Your ladyship our observation is that it was unlikely that the Register for branch members were ever prepared or updated. If it was prepared/updated it is unlikely it was submitted to the relevant authorities and if it was submitted, whether it was submitted (60) days before the elections’. The court is a court of law and applies facts. Such submissions are not facts and the court cannot rely on them in making determination. The court has found no basis to fault the process. The common law presume acts by Public Officers to have been properly discharged until the challenger presents clear evidence to the contrary. The court thus presumes the 5th defendant to have properly discharged his mandate regularly as there is no evidence placed before the court to the contrary.

IN CONCLUSION

33. In any election by secret ballot like in the instant case, the winner is decided by the majority voters. That is the essence of democracy. The 2nd and 3rd Defendants win by majority is not challenged by their competitors. However since the entire election was challenged as not

being fair it cannot be said there was no cause of action though the same was not proved. The preliminary objection was not the proper way to respond to the petition.

34. The election of 1st Defendant for Branch Secretary was challenged. The 1st Defendant received majority votes of 223 against Plaintiff's 81 votes. The Court established that the persons who voted at the said election were eligible members under the Union constitution either through payroll or direct payment to the Union and that was verified during the voting process as a voter was identified by either the payslip or receipt of the union.

35. Consequently the court upholds the Respondent's elections held for Kabras Branch on the 16th January 2021 as free and fair and in accordance with union constitution. The suit dated 1st March, 2021 is dismissed. Each party to bear own costs in this suit.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 24TH DAY OF FEBRUARY 2022

J. W. KELI,

JUDGE.

IN THE PRESENCE OF

COURT ASSISTANT : Brenda Wesonga

PLAINTIFF: Present - Okaka Advocate holding brief for Kapten

Advocate.

DEFENDANTS : 1st Defendant present and holding brief for 2nd –

3rd Advocate