



REPUBLIC OF KENYA



KENYA LAW

THE NATIONAL COUNCIL FOR LAW REPORTING

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**Olum & 15 others v Mundu & another (Cause 370 of 2020)
[2022] KEELRC 1536 (KLR) (9 June 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1536 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 370 OF 2020**

MN NDUMA, J

JUNE 9, 2022

BETWEEN

CALEB ODUOR OLUM 1ST APPLICANT
WASHINGTON OKUMU ANDIA 2ND APPLICANT
BERNARD OCHIENG 3RD APPLICANT
PIUS MUTEYITSI 4TH APPLICANT
MARTIN OZUNGU 5TH APPLICANT
FEDWITH OUKO 6TH APPLICANT
FRANCIS OKAKA 7TH APPLICANT
CLINTON JUMA 8TH APPLICANT
FREDRICK MURULI 9TH APPLICANT
LAWRENCE OKUMU 10TH APPLICANT
JARED MATIANYI 11TH APPLICANT
CHARLES OCHIENG 12TH APPLICANT
HASSAN OPIYO 13TH APPLICANT
PROTUS OKOTI 14TH APPLICANT
COLLINS OKUMU 15TH APPLICANT
JOHN OGOLLA OYUGI 16TH APPLICANT

AND

WYCLIFFE SAVA MUNDU 1ST RESPONDENT
KENYA HOTELS AND ALLIED WORKERS UNION 2ND RESPONDENT



RULING

1. By a statement of claim dated February 19, 2021, the claimants/applicants seek the following orders:-
 - That the honourable court issues against the respondents a declaration:-
 1. That the 1st respondent is unfit to hold office.
 2. That the 1st Respondent is hereby ordered to convene the Executive Board meeting forthwith subsequently all elections conducted by the Existing office bearers of the 2nd respondent be declared null.
 3. That the 1st respondent is hereby forthwith ordered to remit all the withheld monies deducted from the salaries of the employees and/or officers of the 4th respondent as statutory deductions and repayment of loans and savings to the relevant authorities/bodies.
 4. That costs be provided for [Emphasis added]
2. In the amended notice of motion dated September 20, 2021, the following orders are sought:-
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 2. That the 1st and 2nd respondents herein are hereby forthwith ordered to pay to the Kitty of the 2nd respondent, all the accrued sums of monies due and owed to the Jamii Sacco that have been deducted from the salaries of employees and/or officers as personal savings Loan repayment/ and remit the same to Jamii Sacco Society Limited pending the hearing and determination of the main claim.
 3. That pending the hearing and determination of the main claim, the 1st respondent herein is hereby forthwith ordered to pay from the kitty of the 2nd respondent, all accrued sums of monies due to the National Social Security Fund (NSSF) and National Hospital Insurance Fund (NHIF) deducted from the salaries of the 2nd claimant Respondent employees and/or officers as statutory deductions and not remitted regularly.
 4. That pending the hearing and determination of this Application, the 1st respondent herein is hereby suspended from office for failing to perform his duties as envisaged under 3.7 Article ((x) (d) and for failing to uphold the rule of Law pursuant to 3.15 Article (Xviii) (a) (ii) of the Trade unions Constitution pending the hearing and determination of the application.
 5. That costs of this application be provided for.
3. The application is premised on grounds 1 to 7 set out on the face of the application and buttressed in the supporting affidavit of John Oyugi, a duly paid member of the respondent union.
4. He deposes in sum that the 2nd respondent is continuously making statutory deductions from the salaries of its employees and/or officers and has failed and/or refused to remit the same to the relevant authorities which include National Social Security Fund and National Hospital Insurance Fund with impunity.
5. That elected officials of the 2nd respondent have continuously continued to make deductions in respect of loan repayments and personal savings from the salaries of its employees and/or officers but have failed and/or refused to remit the monies so deducted to Jamii Sacco Society Limited. That the respondents are bound to adhere to the rule of law. That the application be allowed accordingly.



6. The applicant filed amended statement of claim dated September 20, 2021 in which they seek the following orders:-
 1. That the 1st respondent is unfit to hold office.
 2. That the 1st respondent is hereby forthwith ordered to remit all the withheld monies deducted from salaries of the employees and/or officers of the 2nd respondent as statutory deductions and repayment of loans and savings to the relevant authorities/bodies.
 3. That costs be provided for.
6. In short, there is no relief sought as against the 2nd respondent in the amended statement of claim dated September 20, 2021. Only a declaration is sought against the 1st respondent. In view of the above amended petition, there is no basis in law or fact therefore for the applicants to seek any interlocutory orders against the 2nd respondent in the amended application dated September 20, 2021. To that extent, the application as concerns the 2nd respondent is fatally defective and the 2nd respondent is struck off, the application in as far as any orders are sought against it.
7. The application therefore only seeks reliefs against the 1st respondent who is described as an elected official of the 2nd respondent and his capacity is not stated in the notice of motion dated September 20, 2021 and in the supporting affidavit.
8. The application does not disclose material particulars connecting the 1st respondent to the alleged deductions and retention of monies. No bank account where alleged monies is held has been disclosed in the application also.
9. Considering the Court of Appeal decision in *Independent Electoral and Boundaries Commission and another –vs- Stephen Mutinda Mule & 3 others* [2014] eKLR in which the court cited *Adetoun Oladeji (Nig) Limited –vs- Nigeria Breweries Plc. S.C. 91/2002* as follows:-

“It is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings or put in another way which is at variance with the averments of the pleadings goes to no issue and must be disregarded,”

the Court notes that the pleadings of the claimant/applicant have not been elegantly pleaded and contain various material errors and/or omissions the totality of which is to deprive the claimant/applicant of any cause of action against 1st and 2nd respondents. The applicant bears the onus of establishing a prima facie case with probability of success against the 1st and 2nd respondents for it to be granted the interim orders sought.
10. The applicants have failed to discharge this onus in terms of the case of *Gielle –vs- Cassman Brown Company Limited* 1978 E.A.
11. Furthermore, the applicants seek final orders in the amended application which orders if granted would pre-empt the final determination of the suit on the merits. The applicants have failed in this respect to demonstrate that they would suffer harm not remediable by way of damages if the interim orders are not granted and the suit is eventually successful.
12. The deponent of the supporting affidavit is not a claimant himself and only describes himself as a member of the 2nd respondent who has information from the records of the respondent. The deponent



falls short of satisfying the court not being an official of the 2nd respondent, nor a claimant who is the source of information so deposed.

13. The balance of convenience, clearly favours the respondents as against the applicants. Accordingly the court declines to grant the orders sought and dismisses the application dated September 20, 2021 with costs in the cause.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 9TH DAY OF JUNE, 2022.

Mathews N. Nduma

Judge

Appearances

Mr. Wanyanga for claimants/Applicants

Mr. Obati for Respondents

Ekale – Court Assistant

