



**Gonzi & 5 others v Kenya Shipping Clearing Freight Logistics Warehouses Workers Union
& another (Cause 6 of 2020) [2022] KEELRC 1366 (KLR) (8 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1366 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 6 OF 2020**

**B ONGAYA, J
JULY 8, 2022**

BETWEEN

**HILLARY MWINGA GONZI 1ST CLAIMANT
BONFACE MUGOYA 2ND CLAIMANT
JACQUELINE OYUGA OKONDO 3RD CLAIMANT
PERIS WAIRIMU KIBINGU 4TH CLAIMANT
CLEOPHAS NICHOLAS WAMALWA 5TH CLAIMANT
ALBERT FUNGUTUT NYONGESA 6TH CLAIMANT**

AND

**KENYA SHIPPING CLEARING FREIGHT LOGISTICS WAREHOUSES
WORKERS UNION 1ST RESPONDENT
REGISTRAR OF TRADE UNIONS 2ND RESPONDENT**

JUDGMENT

1. The claimants filed the memorandum of claim on February 5, 2020 through Khaminwa & Khaminwa Advocates. The claimants are at all material times officials of the 1st respondent trade union. The 1st claimant is the National Vice-Chairman, the 2nd claimant is the National Assistant Treasurer, the 3rd claimant is the National Women Representative, the 4th and 5th claimants are the Notional Youth Representatives, and the 6th claimant is the Executive Committee Member with the union's National Executive Council. While the suit was pending the 1st respondent appears to have held elections for union officials on 28.02.2021 at which most of the claimants lost the positions they held as at the time of filing the suit – except 4th claimant who retained her position as National Youth Representative and the 5th claimant who was elected the National Executive Committee Member. The claimants have



however continued to be members of the union even as at the time the suit was heard on May 18, 2022. The claimants prayed for judgment against the respondents jointly and severally for:

- 1) That an order do issue compelling the Union Secretary to render full and true accounts of the management and affairs of the union including audited accounts for the period between 2015 till the date of the court's determination of this claim.
 - 2) That an order of mandamus issue against the Registrar of Trade Unions to act on the 2nd claimant's section 47(2) complaint by exercising its oversight and supervisory powers over the 1st respondent union as delineated under Registrar of Trade Union letter dated September 17, 2019 and in accordance with the guiding provisions in the Labour Relations Act.
 - 3) An order directed at the 1st respondent union and its officials to call and convene an Annual General Conference (AGM) of the union within a period fixed by the honourable court.
 - 4) An order directed at the 1st respondent union to call or convene a meeting of the National Executive Council within a period fixed by the honourable court.
 - 5) The costs of the claim be borne by the 1st respondent.
2. The claimants case is pleaded as follows. The 2nd claimant wrote to the 2nd respondent the letter dated August 27, 2019 raising serious allegations against the General Secretary of the 1st respondent. While the claimants allege that the 2nd claimant wrote to the 2nd respondent, the court observes that the exhibited letter dated August 27, 2019 is actually addressed to the Ombudsman, Mombasa and signed by the 2nd claimant Bonface Mugoya as Assistant Treasurer or union coordinator. The letter states that the 2nd claimant was questioning the competence, transparency, corruption, integrity, and fitness of the union General Secretary for not revealing and displaying union audited account reports and returns filed to the 2nd respondent since the General Secretary came into office in March 2016. He was afraid that the union may be deregistered for failure to comply with the relevant statutory provisions. It was alleged in the letter that the union funds were being mismanaged. Further, the letter alleged the General Secretary had made it impossible for the 2nd claimant to execute his duties as Assistant Treasurer because he demanded the 2nd claimant shares his salary or his appointment hangs in air – and he had no option but to send to him Kshs 1, 000.00 per month by Mpesa and he was now acting because he had been pushed so much by the General Secretary. Further, the National Executive Council (NEC) was required to meet every 3 months but the Secretary General had failed to convene such meetings as authorised to do. The letter stated the 2nd claimant was being pushed to fabricate union records for inspection yet no clear records were in place. The 2nd claimant, in that letter, stated the General Secretary in 2014 had been found by the court guilty of misusing employees' money without consent.
3. The further case is that the 2nd respondent failed to act on the letter of August 27, 2019 until the issues were raised with the Ombudsman who issued the letter dated September 4, 2019 asking a response from the 2nd respondent in view of the complaint. The letter dated September 4, 2019 by the Commission on Administrative Justice (CAJ or Office of the Ombudsman) was addressed to the 2nd respondent. The 2nd respondent replied to the CAJ by the letter dated September 17, 2019 stating that the 2nd respondent had already written to the Secretary General to forward the annual returns for the years 2015-2018 failure to which the 2nd respondent would take legal action against the union. Further, the Secretary General had presented the returns of 2015 but was yet to forward for other years. The reply further stated that the Secretary General had failed to forward the union's records and books of account for inspection for year 2019 while the records were below average for the last two years. The letter concluded thus, "Our office is already dealing with the union's blatant breach of the legal provisions on operations of the trade unions."



4. The claimants' further case is that as demonstrated in the letter dated August 23, 2019 by James Onkoba Tongi (the union General Secretary) to Managing Director of Kenya Commercial Bank Ltd on persons to access statements on account 1106515110, the bank is informed that only the General Secretary as the CEO and one Jane Ndungwa Mbuvi the National Treasurer can access the account and the statements be send to tongijamesXX@gmail.com. Further the bank statement is confidential and only to be kept by the two officials for purposes of the union expenditure. It is the claimant's case that the General Secretary has continued to misuse union funds. Further, the 2nd respondent's failure to act has exposed the 2nd claimant as the whistle blower to ridicule, resentment and undue pressure from the General Secretary; the union funds continue to be expended without due controls, consent and direction of the union's NEC and AGM mandated to provide the said authority, direction, oversight and approval; and the 2nd respondent's failure to undertake legal mandate of oversight and supervision under the Labour Relations Act will cause the union to stop. It is pleaded thus, "18. (D) The 2nd respondent's failure to exercise its statutory powers is a failure of administrative action and is the proximate cause of contravention of the claimants' freedom of association for only the 2nd respondent is by law, at first instance, vested with administrative powers of oversight and supervision over Trade Unions use of funds entrusted by the union members and whether said funds and expended towards the objects of the said Trade Unions." It is further pleaded that in the 1st respondent union, both the union constitution, the Labour Relations Act and the Constitution of Kenya are considered documents for academic exercise hence the claimants are aggrieved enough to protect the union from waste for the passion they hold for the union movement in general.
5. It is further pleaded for the claimants as follows:
- a) Every shilling received by the 1st respondent union must be expended in accordance with the dictates of a budget approved by the union's NEC and direction, acquiesce, and approval of the same budget by the Union's Annual Conference (AGM). That is per the Union constitution and the Labour Relations Act.
 - b) The 1st respondent has neither sat for an GM nor a NEC meeting in the past 4 years since 2016. Thus for the past 4-years the disposal of funds by the 1st respondent union has been illegal, unrecorded and unsanctioned and a secret known and kept by the few parties having access to its bank accounts.
 - c) The General Secretary is one of the parties with access to the said bank accounts and is believed to be misappropriating the same for personal use there being absolutely no budget or oversight by either the union NEC or AGM.
 - d) The General Secretary is the only official of the union with the powers per the union constitution to call or convene both the NEC and AGM. It is believed that failure to call or convene the NEC or AGM is a calculated move to avoid oversight by the union membership.
 - e) Freedom of association sacrosanct and partly exercised through the trade union movement. It is a right recognised by both the Constitution and the Labour Relations Act. The 2nd respondent is the public official tasked with ensuring that the rights of registered members of trade union movement are not violated or abused in turn by parties entrusted to lead respective movements. Failure by the 2nd respondent to effectively provide oversight in turn leaves the members of the movement exposed and at the mercy of defeatists of the freedom of association. The 2nd respondent has admitted that the 1st respondent is operating outside the law but has failed to act in time to protect from continued waste It is urged that the orders sought are therefore fair and just to be issued in the interests of the union.



6. The 1st respondent filed a statement of defence on 05.04.2021 in person and Mr Samson Ong'era, the National Organising Secretary, appeared in that behalf. The 1st respondent pleaded that on February 28, 2021 it conducted its Annual Delegates Conference where the 1st, 2nd, 3rd, and 6th claimants lost their positions. They had therefore lost standing to sue for purposes of section 41 of the *Labour Relations Act*, 2007. The 1st respondent further pleaded as follows. The 2nd claimant's letter dated August 27, 2019 was not processed per 1st respondent's internal procedures per the union constitution, it was not copied to the General Secretary and raised no viable allegations for the misapplication of the 1st respondent's funds and the letter was based on rumours, innuendoes and speculations. The claims do not qualify for a suit under section 41 of the *Act*. No particulars of alleged fraudulent transactions on the union gazetted bank account have been pleaded. Alleged misuse of funds under section 41 of the *Act* is not a question of mind but rather of evidence. The union has carried out its transactions per its constitution. There was no established violation of the *constitution* occasioning the 1st respondent loss of funds. The 1st respondent's institutions are functional and claimants have not channelled their grievances per rules 6 (2) (1), 8(3) (b) (iii), 11(1) & (2), 15(f) (x), and 18(b) of the union constitution. The letters exhibited for the claimants do not show misappropriation of 1st respondent's funds as envisaged in section 41 of the *Act*. The letter of August 27, 2019 shows advancement of a selfish agenda or personal vendetta against the office of the General Secretary and there was no attempt to invoke rule 11 of the *constitution* if at all valid grievances existed. No case has been advanced against the union officials and it was not conceivable that the 1st respondent misappropriates its own funds. No specific case and allegations have been made against the registered union officials. No orders should be awarded based upon speculation and rumours. The claimants are aware of the 1st respondent elaborate constitutional safeguards promoting a seamless internal dispute resolution mechanism which the claimants are unwilling to invoke. The allegations against the 2nd respondent are misplaced and the 2nd respondent was doing all practical things in the union members' interest. The 2nd respondent has been in communication with the union. The court should save itself from the embarrassment of adjudicating on issues that are not properly phrased as justiciable controversies. The issues raised are insubstantial and so attenuated that the honourable court lack any remedy for the claimants other than dismissing the memorandum of claim forthwith. There is no evidence that the 1st respondent has violated its own constitution and the claim be dismissed with costs.
7. The 2nd respondent did not file a memorandum of response or documents and witness statements and on February 10, 2022 the 2nd respondent's case was ordered closed subject to final submissions. The 1st respondent failed to avail the proposed witness and all claimants testified to support their case. By consent order the documents filed and served for the parties were deemed duly produced and admitted as filed. Final submissions were filed for the parties. The court has considered all the material on record and makes pertinent findings as follows.
8. To answer the 1st issue for determination, as submitted for the respondents each trade union is entitled to run its affairs in accordance with its constitution. Article 41 (4) of the *Constitution* of Kenya 2010 provides that every traded union and every employers' organisation has the right:
- a) to determine its own administration, programmes and activities;
 - b) to organise; and
 - c) to form and join a federation.
- Section 8 of the *Labour Relations Act*, 2007 provides for rights of trade unions, employers' organisation and federations. Under subsections 8(a) and (b), every trade union, employers' organisation or federation has the right to:



- a. subject to provisions of the Act, determine its own constitution and rules; and hold elections to elect its officers;
 - b. plan and organise its administration and lawful activities.
9. The court returns that the 1st respondent has the right, distinct from its members, to institute its own constitution and rules, to hold elections of its officers, and to plan and organise its administration and lawful activities. The chain to that distinctive right under section 8 of the Act appears to be provisions of the Act and, only with respect to the issues of determination of the constitution and elections.
 10. To answer the 2nd issue for determination, as submitted for the claimants, they have the requisite standing to institute the suit. The suit alleges mismanagement of the 1st respondent's funds and bad governance in dysfunctional operations of the organs of the 1st respondent. The court considers that there was no dispute that the claimants are members of the 1st respondent and as such they are directly affected by the allegations made if at all the same are established. The claimants have a sufficient interest in the application of the funds and governance of the 1st respondent. Accordingly, they cannot be said to lack in *locus standi*. As submitted for the claimants, in Alfred Njau & 5 others v City Council of Nairobi the Court of Appeal held, "The term *locus standi* means the right to appear in court and conversely, as is stated in Jowitt's Dictionary of English Law, to say that a person has no *locus standi* means that he has no right to appear or be heard in such and such proceeding."
 11. In finding that the claimants had *locus standi*, the court has considered article 41(2) (c) which provides that every worker has a right to form, join or participate in the activities and programmes of a trade union. The court considers that the claimants as members of the 1st respondent are seeking to actualise that right by seeking to make out their suit about the alleged misapplication of funds and the alleged bad governance.
 12. Thus subsection 4(1) of the Labour Relations Act, 2007 provides that every employee has the right to participate in forming a trade union or federation of trade unions; join a trade union; or leave a trade union. Subsection 4 (2) of the Act provides that every member of a trade union has the right, subject to the constitution of the trade union to participate in its lawful activities; participate in the election of its officials and representatives; stand for election and be eligible for appointment as an officer or official and, if elected or appointed, to hold office; and to stand for election or seek for appointment as a trade union representative and, if elected or appointed, to carry out the functions of a trade union representative in accordance with provisions of the Act or collective agreement.
 13. The court returns that the claimants have established sufficient interest as members of the 1st respondent and they were entitled to file the suit as having requisite *locus standi* because the suit is towards actualisation of their constitutional and statutory employees' right to freedom of association. Once they are members of the 1st respondent, they are entitled as of right to urge a suit about application of funds and governance of the 1st respondent.
 14. To answer the 3rd issue, the court finds that it was not misconceived for the claimants to urge a case of mismanagement and misapplication of funds by the 1st respondent and by itself as such. It was urged and pleaded for the 1st respondent that no action had been taken or proposed against any of the 1st respondent's officials in a case of proposed violation of the 1st respondent's constitution. However, the court has already established that the 1st respondent as a trade union is autonomous person in law with distinct rights and, therefore, distinct obligations for example to its members, other persons natural or artificial, and statutory obligations as may be imposed by relevant law. Section 21 of the Labour Relations Act provides that a trade union, employers' organisation or federation shall be registered as



- a body corporate with perpetual succession and common seal with the capacity in its own name to sue and be sued, and, to enter into contracts, and, hold, purchase or otherwise acquire and dispose of moveable and immovable property.
15. While making that finding, the court considers that article 10(2) of the Constitution of Kenya, 2010 provides that the national values and principles of governance bind all persons whenever any of them applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy. Trade unions being persons, they are bound accordingly even in their internal governance matters.
 16. The 4th issue is whether the claimants have established a case for award of remedies as prayed for. The court finds as follows.
 17. First, the claimants pray that an order do issue compelling the Union Secretary to render full and true accounts of the management and affairs of the union including audited accounts for the period between 2015 till the date of the court's determination of this claim. The claimant witness No 4(CW4) was Tabu Okello Membe. He was voted the 1st respondent's national trustee on March 13, 2016. By that office, he held general authority and responsibilities over the 1st respondent's property as stipulated in rule 12 of the 1st respondent's rules. No union official or member could apply union resources or property without his consent. His evidence was that since 2016 the General Secretary failed to call and convene NEC meetings contrary to the union constitution. His evidence was that at the General Secretary's instruction and without any resolution of the NEC the General Secretary has caused him to sign cheques for irregular withdrawal of the union funds from the union bank account at Kenya Commercial Bank. The allowances in such withdrawals had been paid to CW4, one Mr Oponyo and the Secretary General to the exclusion of all other union officials. He was also shocked to see a bank account opened at the cooperative bank without his knowledge. In cross-examination, CW4 testified that his evidence was that the General Secretary miscondacted himself by not convening AGM and NEC meetings since 2016 and not that he had misappropriated funds. He testified thus, "No NEC meeting was ever conducted. Treasurer will tell us if money was lost. As a trustee I learned money got misappropriated. Secretary General is paid auditing fees not delivered to auditors. No audit reports." It was CW4's evidence that the General Secretary was given money for specified purposes but which appeared not implemented at all.
 18. Claimant witness No 5 (CW5) was Oponyo Wawire, the National Deputy General Secretary since March 13, 2016 and his testimony was that over five (5) years of his tenure, in the absence of the General Secretary, he carried out all the Secretary General's duties or as assigned by the NEC. His evidence was that NEC and AGM had not been conducted since 2016. His case was that as a gentleman he spoke to the General Secretary about the issues and he had not seen the audited accounts but auditors' fees had been paid out to the General Secretary for the purpose. CW5 confirmed that the union constitution provided for internal mechanisms to deal with issues.
 19. The court has considered the evidence. It is true that no NEC or AGM meetings were held as provided for in the 1st respondent's constitution. The 1st respondent as a corporate body had the obligation by its constitution to hold the meetings and to render the audited accounts which the 2nd respondent's letter to the Ombudsman and on record has confirmed was not done. The court finds that the order to render the account would issue but as directed to the 1st respondent and not the Secretary General.
 20. While making that finding the court has considered that the Secretary General was not a party to the suit and an order may not issue directed against him as such. Nevertheless, the claimants have established that the 1st respondent has run its affairs contrary to its own constitution. As urged for the respondents and as confirmed by the claimants' own evidence, there exist internal mechanisms



including disciplinary procedures that may be invoked but have not been shown to have been invoked against any one of the 1st respondent's officials including the Secretary General. The further evidence was that whereas under the 1st respondent's constitution the meetings are to be convened by the General Secretary, the claimants never invoked the constitutional procedures to requisition for the meetings as envisaged. The internal failures appear widespread as entangling all the 1st respondent's officials at the material time. There was no claim and prayer that the Secretary General be compelled to convene a requisitioned meeting he may have failed to do so per the 1st respondent's constitution – and in a suit properly initiated against the General Secretary in that regard. The court therefore finds that the prayer will issue but only as directed at the 1st respondent as a body corporate.

21. While making that finding the court has considered section 47 of the [Labour Relations Act](#) which provides that the court may order any person who has in his possession or control any property of a trade union in violation of its rules or who has unlawfully expended or withheld its moneys, to deliver that property or pay that money to its trustees, or, suspend any official who contravenes the order to deliver the money or property. Subsection 47(1) provides that a complaint under section 47 of the [Act](#) can be brought by the Registrar (2nd respondent) or by a member of the trade union. The court finds that in the instant case, there was no complaint to the court against the General Secretary or any other official of the 1st respondent or any other person as envisaged in section 47 of the [Act](#). The suit was filed only against the union and the Registrar.
22. Second, the claimants prayed for an order of mandamus to issue against the Registrar of Trade Unions to act on the 2nd claimant's section 47(2) complaint by exercising its oversight and supervisory powers over the 1st respondent union as delineated under Registrar of Trade Union letter dated September 17, 2019 and in accordance with the guiding provisions in the [Labour Relations Act](#). It would appear that the prayer is for the registrar to bring a complaint to court as envisaged in subsection 47(2) of the [Act](#). It is submitted that the 2nd respondent has failed to implement the terms of her own letter dated September 17, 2019. The court considers that while that letter is an acknowledgement by the 2nd respondent that the union through the Secretary General has failed to meet its statutory obligations, the failures appear to fall squarely upon the 1st respondent and there is no allegation that any person is culpable as envisaged in section 47 of the [Act](#). Further, mandamus may only issue if the 2nd respondent being required to perform a duty as vested has refused to do so. There is no evidence that with respect to the letter dated September 17, 2019, the claimants thereafter required the 2nd respondent to make a complaint per section 47(2) and the 2nd respondent failed to do so. In any event, the wording of section 47(2) appears to confer a discretion and not a duty upon the 2nd respondent to make the complaint as envisaged. The court has also considered that under section 47(2) of the [Act](#), the claimants as members of the union are by themselves not excluded but permitted to make such a complaint to the court against such person in terms of subsection 47(1). In the opinion of the court, the claimants by themselves being permitted to make the complaint they want the court to order the 2nd respondent to make by way of granting mandamus operates as a bar to the grant of the prerogative order of mandamus because one cannot complain of a failure of performance of an alleged duty by another of which duty was as well within one's power to by oneself, perform. The 2nd respondent's submissions are upheld that the claimants may by themselves make the complaint under section 47 (2) of the [Act](#), requisition meetings per the union constitution or act per the union constitutional provisions on disciplinary procedures against an official or member. The prayer will there be declined as falling outside the terms of section 47 of the [Act](#) and as there are well established and clear bars to its being granted.



23. The parties did not address the point but as to whether the claimants were entitled to seek the prerogative order of mandamus in an ordinary suit, the answer is in the affirmative. In particular, rule 7 of the *Employment and Labour Relations Court (Procedure) Rules* provides as follow,

“7.

- (1) A party who wishes to institute a petition shall do so in accordance with the *Constitution* of Kenya (*Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution Practice and Procedure Rules*, 2012.
- (2) A person who wishes to institute judicial review proceedings shall do so in accordance with section 8 and 9 of the *Law Reform Act* and order 53 of the *Civil Procedure Rules*.
- (3) Notwithstanding anything contained in this rule, a party is at liberty to seek the enforcement of any constitutional rights and freedoms or any constitutional provision in a statement of claim or other suit filed before the court.

24. The same rules define suit thus, “suit means a claim, petition, application for judicial review, appeal or any proceedings before the court for determination.”

25. The court considers that in view of that rule 7(3) and the definition of suit, the applicant’s mixed suit or ordinary action for the judicial review order of mandamus and other reliefs as prayed for was saved.

26. Third, the claimants prayed for an order directed at the 1st respondent union and its officials to call and convene an Annual General Conference (AGM) of the union within a period fixed by the honourable court. The record shows that the 1st respondent convened an AGM on February 28, 2021 at which the national officials were elected. The prayer is deemed overtaken. Further, the claimants have not shown that they have attempted to requisition a special general conference per 1st respondent’s rule 6(2) and encountered justiciable huddles to justify the court’s intervention as prayed for. The 1st respondent’s submission that nothing stops the claimants from causing the meeting to be convened per the 1st respondent’s constitution and rules is upheld. The prayer is declined.

27. Fourth, the claimants prayed for an order directed at the 1st respondent union to call or convene a meeting of the National Executive Council within a period fixed by the honourable court. As submitted for the 1st respondent, the claimants should invoke rule 8(3) of the union constitution. The National General Secretary convenes the meetings in consultation with the National Chairperson and Treasurer, per the said rule 8(3), every three months; when necessary; or when 2/3 of members of NEC requisition as prescribed.

28. The court has considered the parties’ margins of success and that the claimants are members of the 1st respondent and there will be no orders on costs.

29. In conclusion the suit is hereby determined with orders:

1. The order hereby issued compelling the 1st respondent to render full and true accounts of its management and affairs including audited accounts for the period between March 13, 2015 until the date of this judgment (prepared on annual basis) and to file the same in court and with the 2nd respondent, and to serve the claimants herein, not later than December 1, 2022.
2. There be no orders on costs.



**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS
FRIDAY 8TH JULY, 2022.**

BYRAM ONGAYA

JUDGE

