



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA**

**CAUSE NO. 6 OF 2020**

HILLARY MWINGA GONZI.....1<sup>ST</sup> CLAIMANT  
BONIFACE MUGOYA.....2<sup>ND</sup> CLAIMANT  
JACQUELINE OYUGA OKONDO.....3<sup>RD</sup> CLAIMANT  
PERIS WAIRIMU KIBINGU.....4<sup>TH</sup> CLAIMANT  
CLEOPHAS NICHOLAS WAMALWA.....5<sup>TH</sup> CLAIMANT  
ALBERT FUNGUTUT NYONGESA.....6<sup>TH</sup> CLAIMANT

- VERSUS -

**KENYA SHIPPING, CLEARING, FREIGHT, LOGISTICS AND  
WAREHOUSES WORKERS UNION.....1<sup>ST</sup> RESPONDENT  
REGISTRAR OF TRADE UNIONS.....2<sup>ND</sup> RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 29<sup>th</sup> January, 2021)

**RULING**

The claimants filed on 05.02.2020 an application by the notice of motion filed through Khaminwa & Khaminwa Advocates. The application was brought under section 41(1) of the Labour Relations Act No. 14 of 2007. The substantive prayers are for orders thus:

- 1) That pending hearing and determination of the claim herein, an injunction does issue restraining the 1<sup>st</sup> respondent or its officials and employees from dealing with, or drawing from the 1<sup>st</sup> respondent's bank accounts wherever situate or either expending funds received in the respondent's office without the consent or approval of the Registrar of Trade Unions.
- 2) That costs be provided for.

The application was based on the annexed supporting affidavit of the 1<sup>st</sup> claimant and upon the following grounds:

- 1) That every shilling received by the 1<sup>st</sup> 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 in accordance with the union constitution and Labour Relations Act, 2007.
- 2) The 1<sup>st</sup> respondent union has neither sat for an AGM nor a NEC meeting in the past 4 years. For the 4 years the use or disposal of funds by the 1<sup>st</sup> respondent union has therefore illegal, unrecorded and unsanctioned and a few parties have had access to the union bank accounts.
- 3) The union Secretary General is one of the parties with access to the bank accounts and is believed to be misappropriating the same for personal use there being a budget or oversight by either the union NEC or AGM. The Secretary General is the only official with powers under the union constitution to call or convene the AGM and the NEC meetings. He has failed to convene the AGM and NEC meetings as a calculated move to avoid oversight by union members. The freedom of association is sacrosanct and is partly

exercised through the trade union movement. The freedom is recognised by the constitution and the Labour Relations Act, 2007. The 2<sup>nd</sup> respondent is the statutory protector of that right. Failure by the 2<sup>nd</sup> respondent to effectively provide oversight in turn leaves the members of the movement exposed and at the mercy of defeatists of freedom of association.

4) An order of injunction restraining unauthorised or unlawful expenditure of funds from trade union by five or more persons with sufficient interest can issue pursuant to section 41 of the Labour Relations Act, 2007.

5) The 2<sup>nd</sup> respondent admits that the union is operating outside the law but has failed to act in time to protect from continuing waste.

6) The orders sought are fair and just to issue in the interest of the union.

On 31.08.2020 the claimants filed another notice of motion dated 28.08.2020 and pursuant to section 41, 42, 43, 45, 47(1) and (2) of the Labour Relations Act, 2007. The claimants prayed for orders:

1. Spent.

2. That pending hearing and determination of the suit herein an injunction do issue restraining the 1<sup>st</sup> respondent, its agents, employees from unlawful misuse of the trade union's account funds.

3. That pending hearing and determination of the suit herein an injunction do issue restraining the 1<sup>st</sup> respondent from suspending the claimants from participating or receiving money from any activity funded by F.I.C

4. That costs be provided for.

The application was based on the annexed 1<sup>st</sup> claimant's supporting affidavit and upon the following grounds:

1) The claimants are members of the trade union as per the Labour Relations Act under section 35 and have not in such nature violated the constitution of the trade union.

2) That being members of the trade union they have the right to call for an injunction against the 1<sup>st</sup> respondent hindering them from participating in the union activities.

3) The claimants stand to suffer if the orders sought herein are not granted as prayed.

4) The application be read together with the application dated 05.02.2020.

5) The Court has powers to grant the prayers sought herein.

The 1<sup>st</sup> respondent filed a notice of preliminary objection dated 10.03.2020 and filed on 11.03.2020 that the suit be struck out with costs upon the following grounds:

1) That the applicants are not persons contemplated under section 41 and 33(c) of the Labour Relations Act, 2007.

2) That the applicants herein are not paid up members of the 1<sup>st</sup> respondent.

The 1<sup>st</sup> respondent further opposed the application dated and filed on 05.02.2020 by filing on 11.03.2020 the replying affidavit of James Onkoba Tongi, the Secretary General of the 1<sup>st</sup> respondent. It was stated and urged for the 1<sup>st</sup> respondent as follows:

1) The supporting affidavit had been sworn on unspecified date. The Court has examined the filed supporting affidavit and is sworn at Mombasa on 05.02.2020. Accordingly, the Court finds that the affidavit is duly sworn on the date as stated and the Court will not return to that point of opposition.

2) The application is incompetent, a non-starter, frivolous, scandalous, incurably defective in form, substance and law and is an abuse of court process and should be struck out or dismissed with costs.

3) The application seeks to interrupt the smooth operations of the 1<sup>st</sup> respondent through injunction of its finances and accounts under section 41 of the Labour Relations Act, 2007. The prayer is inaccurate lacking in particularity of the account the claimants have interest and the use of "account" amounts to zero.

4) The applicants have not come with clean hands because they failed to disclose that they lack capacity and authority to institute a suit against the 1<sup>st</sup> respondent under section 41. The applicants lack *locus standi* to sue the 1<sup>st</sup> respondent under the 1<sup>st</sup> respondent's constitution Rule 3 (A) (ix) because they are in arrears for more than three months and they are strangers before the Court.

5) The claimants are not persons contemplated under section 41 of the Labour Relations Act, 2007 and they lack interest as they are

not paid up members of the 1<sup>st</sup> respondent as per Rule 2 (2) (a) (b) (c) and (d) of the 1<sup>st</sup> respondent's constitution. The claimants are strangers and the application is not one amongst those provided in Rule 8(3) (b) (i) and (iii) of the constitution.

6) Ground 1 in the notice of motion is admitted but the 1<sup>st</sup> respondent has complied with its constitution and the Labour Relations Act, 2007 and has not done any unlawful thing.

7) The 1<sup>st</sup> respondent has observed its constitution and contrary to the claimants' case, it has convened meetings of the NEC and the AGM.

8) The 3<sup>rd</sup> claimant resigned from the union effective January 2018 and as per her letter dated 21.11.2017 and received by her employer on 30.01.2018 stopping deduction of union dues.

9) The claimants are part of the 1<sup>st</sup> respondent and is against public policy for them to sue themselves. It is also not their function to oversee the operations of the 2<sup>nd</sup> respondent.

The 1<sup>st</sup> respondent also filed on 17.09.2020 the replying affidavit of James Onkoba Tongi to oppose the claimants' application of 28.08.2020. It was stated and urged as follows:

1) To the extent that the application replicates the earlier application of 05.02.2020, the same is an abuse of court process.

2) The 1<sup>st</sup> respondent had already opposed the application of 05.02.2020 by filing the replying affidavit on 11.03.2020 and the preliminary objection to the entire suit dated 10.03.2020. The preliminary objection should therefore be prioritised.

3) Per the notice of preliminary objection dated 16.09.2020 and filed on 17.09.2020, the application dated 28.08.2020 offends the *sub judice* rule per section 6 of the Civil Procedure Act; and, offends section 18 of the Civil Procedure Act that there be efficient use of the available judicial and administrative resources.

4) Rule 9 of the 1<sup>st</sup> respondent's constitution empowers all its officials to carry collective mandate including preparation of the budget and other union activities and no evidence had been provided to show that the claimants had been barred from discharging their respective duties. The 1<sup>st</sup> respondent has not operated a bank account outside the gazetted bank account. The 1<sup>st</sup> respondent is also empowered to operate various accounts such as project accounts, branch accounts and which bank accounts operate independently under the supervision of executive council or committee per Rule 20 (5) of the 1<sup>st</sup> respondent's constitution.

The 1<sup>st</sup> respondent filed on 05.10.2020 the further affidavit of Jane Mbuvi stating that she was the 1<sup>st</sup> respondent's national treasurer and she was charged with accounting for the 1<sup>st</sup> respondent's funds per the 1<sup>st</sup> respondent's constitution and the Labour Relations Act, 2007. She accounts to the 2<sup>nd</sup> respondent on application of the 1<sup>st</sup> respondent's funds. The 1<sup>st</sup> respondent's national Secretary General is not involved in withdrawing the 1<sup>st</sup> respondent's funds. She stated that she undertakes the withdrawals and in alternative, the 1<sup>st</sup> trustee one Tabu Okello undertakes withdrawals. Further, the claimants had never notified her about the alleged withdrawals or misuse of 1<sup>st</sup> respondent's funds by the national Secretary General or otherwise. She stated that 1<sup>st</sup> respondent had properly caused other branch bank accounts which operate independently under accredited branch officials and she had not received a complaint in that regard. She concluded that the complaints by the claimants against the 1<sup>st</sup> respondent and its national Secretary General were therefore frivolous, mischievous, malicious hearsay, rumours and without basis in law and fact, and, the application of 05.02.2020 be dismissed with costs.

The 1<sup>st</sup> claimant filed a further affidavit on 02.10.2020 exhibiting receipts to show that the claimants were proper members of the 1<sup>st</sup> respondent and had been making monthly contributions including the 1<sup>st</sup> and 2<sup>nd</sup> claimants. It was further stated that the Secretary General had in the name of the 1<sup>st</sup> respondent opened account No. 1100732241400 at the Co-operative Bank of Kenya and made transactions thereon without the knowledge of the claimants and other 1<sup>st</sup> respondent's members. Further by gazette notice no. 204-647-485 at KCB, Moi Avenue, was the only account members were aware of. Further, while the 3<sup>rd</sup> applicant may have communicated her resignation as a member, no relevant meetings had been held to replace her as a union official and she is still a duly registered official. Further, the union trustees should manage the 1<sup>st</sup> respondent's accounts per section 41(2) of the Labour Relations Act and Rule 12 of the Union Constitution pending the hearing of the suit and consequential to the grant of the interim orders as prayed for. Further, no injury will be occasioned to the respondents if the injunction is granted.

The 2<sup>nd</sup> respondent filed on 20.01.2021 the replying affidavit of E.N. Gicheha, Registrar of Trade Unions, and through the learned Senior Litigation Counsel, Martin M. Mwanjeje, for Attorney General. The 2<sup>nd</sup> respondent stated and urged as follows:

1) The mandate of the 2<sup>nd</sup> respondent is the registration and regulation of trade unions.

2) That the 1<sup>st</sup> respondent has acted in contravention of the law by failure to file annual returns for the years 2017 – 2019 and failing to keep and maintain proper books and records of account as provided for under the provisions of section 43 and 44 of the Labour Relations Act, 2007. In particular, the national Secretary General for the 1<sup>st</sup> respondent has been addressed by the 2<sup>nd</sup> respondent the letters dated 26.03.2018; 27.04.2018; and 09.05.2019 in that regard and as exhibited on the replying affidavit as ENG 1; ENG2; and ENG 3 respectively.

3) The Secretary General of the Union explained the failure to file the annual returns on time due to financial problems affecting the

union as per his letters of 27.04.2018; 16.08.2019 and 23.05.2019.

4) The returns for 2015 to 2016 have been filed. The 2<sup>nd</sup> respondent again wrote to the Secretary General the letters of 17.09.2019; 13.12.2019; and 17.01.2020 regarding the annual returns and inspection of accounting records. It cannot therefore be true that the 2<sup>nd</sup> respondent has failed on her statutory mandate.

5) The records were inspected on 05.09.2019 and the standard of accounts returned.

6) An in-depth audit of the 1<sup>st</sup> respondent's accounts can only be undertaken by the auditors appointed by the 1<sup>st</sup> respondent per its constitution.

7) Under Rule 18 of the unions constitution a member of a union is at liberty and as of right, free from the Secretary General's discretion, to inspect all books of accounts and other financial records of the union's account maintained at the union head office.

8) Under section 47 of the Labour Relations Court Act a member of a trade union who has in his possession knowledge of the trade union's funds being unlawfully.

9) On failure by the Secretary General to hold AGM and NEC meetings, the 2<sup>nd</sup> respondent will not interfere with the internal working of the trade union. The claimants are also officials of the NEC and have their respective roles in that regard. The 2<sup>nd</sup> respondent does not micro-manage the running of the 1<sup>st</sup> respondent. The union has not now embarked to file annual returns and has undertaken to file for pending years in due course.

The 1<sup>st</sup> issue for determination is whether the claimants are valid members of the 1<sup>st</sup> respondent and therefore not lacking standing to file the present suit as urged in the 1<sup>st</sup> respondent's notice of preliminary objection dated 10.03.2020. Section 41 (1) of the Labour Relations Act, 2007 provides that the Court may grant an injunction restraining unauthorized or unlawful expenditure of the funds of a trade union on application by the Registrar or by five or more persons having a sufficient interest in the relief sought. The undisputed evidence is that the claimants are duly registered officials of the 1<sup>st</sup> respondent. Section 31 of the Act provides that officials of a trade union shall be persons who have been engaged or employed in the sector for which the trade union is registered. Section 35(5) of the Act provides that no change of officials shall have effect until it is registered by the Registrar. In view of those provisions and the undisputed evidence that the claimants are registered officials of the 1<sup>st</sup> respondent, the Court returns that they have established standing to file the present case and application because as registered officials of the 1<sup>st</sup> respondent they have sufficient interest in affairs of the 1<sup>st</sup> respondent. In any event, section 41(1) of the Act prescribes the applicants as five or more persons with sufficient interest and does not provide that such persons need to be members of the trade union. The notice of preliminary objection dated 10.03.2020 is therefore lacking in merits and is liable to dismissal.

To answer the 2<sup>nd</sup> issue for determination, the Court returns that the 1<sup>st</sup> respondent's preliminary objection dated 16.09.2020 will fail because the prayers made in the application dated 28.08.2020 and the one of 05.03.2020 are substantially different. The Court finds that the prayers and the provisions of law invoked being substantially different, sections 6 and 1B of the Civil Procedure Act as invoked in the notice of preliminary objection are not applicable at all. The Court finds that the application dated 16.09.2020 did not therefore amount to an abuse of court process as alleged for the 1<sup>st</sup> respondent. The preliminary objection will therefore fail.

The 3<sup>rd</sup> issue for determination is whether the claimants are entitled to the temporary injunction as prayed for in the application dated 05.03.2020. The claimants have invoked section 41 (1) of the Labour Relations Act, 2007 and pray that a temporary injunction be issued restraining the 1<sup>st</sup> respondent or its officials and employees from dealing with, or drawing from the 1<sup>st</sup> respondent's bank accounts wherever situate or either expending funds received in the respondent's office without the consent or approval of the Registrar of Trade Unions.

It is clear to the Court that an injunction under section 41(1) of the Act restrains unauthorized or unlawful expenditure of the funds of a trade union. The only purposes for which the funds of a trade union may be used are set out in section 39 of the Labour Relations Act, 2007. In the Court's opinion, an injunction under section 41(1) of the Act will issue with respect to application of the union funds for a purpose other than any of the purposes set out in section 39 of the Act in which event the, the expenditure is unlawful; or injunction may issue if the expenditure being for lawful purpose per purposes prescribed in section 39, it was not authorised. Thus the Court considers that a *prima facie* with a probability of success is established if, the applicant shows the existence of unlawful expenditure (one outside the purposes in section 39 of the Act) or if the applicant shows existence of an expenditure that was not authorised. The Court reckons that under section 41(1), the subject of the injunction is invariably an "expenditure" that is unlawful or unauthorised.

What is an expenditure? The **Black's Law Dictionary 10<sup>th</sup> Edition** defines "expenditure" as the act or process of spending or using money especially the disbursement of funds; or a sum paid out. The Court considers that an expenditure is unauthorised if the procedure to incur expenditure is impaired or a person without authority incurs it. Further, the Court considers that an expenditure as money paid out is unlawful if it is for a purpose falling outside the purposes prescribed in section 39 of the Act. In any event, unauthorised expenditure and unlawful expenditure by their nature run into each other.

The claimants' case is that the 1<sup>st</sup> respondent has failed to convene an AGM or a NEC meeting for the past 4 years. Further, the Secretary General who should convene the AGM or the NEC has failed to do so as a calculated move to avoid oversight by union members. Thus, there has been no oversight and which amounts to unauthorised expenditure. On the other hand, the 1<sup>st</sup> respondent's national treasurer, Jane Mbuvi, has by her further affidavit stated that she is in charge of all information in respect of receiving and expending of the 1<sup>st</sup> respondent's finances and funds so that, in that regard, she is the one obligated to account for the 1<sup>st</sup> respondent's funds. She further confirms that the funds have been withdrawn with approval of the 1<sup>st</sup> respondent's management and the 1<sup>st</sup> respondent's Secretary General has not made any withdrawals from the bank accounts.

The Court has considered the parties' respective positions and the material on record. First, the Court returns that it is not alleged that the 1<sup>st</sup> respondent has applied its funds for purposes other than the purposes or uses in section 39 of the Act. Second, under section 42 of the Act the 1<sup>st</sup> respondent's treasurer is obligated to render an accurate account of all moneys received or paid by the treasurer at least once every year or as required by resolution of the members of the union; and the section requires that the accounts shall be audited by a qualified professional auditor. It is the claimants' case that such audited accounts do not exist because no auditor had been appointed and no AGM or NEC meeting had been held for the 1<sup>st</sup> respondent. Further, no annual returns had been made for the years 2017 to date and as per paragraphs 6, 7, and 24 of the 2<sup>nd</sup> respondent's replying affidavit. Exhibit ENG – 5 of the replying affidavit confirms that the last inspections done in 2017 and 2018 revealed that the 1<sup>st</sup> respondent's standard of accounts is below average and most of the records were not kept. Exhibit ENG of the replying affidavit confirms that annual returns for the years 2016 – 2018 had not been submitted for the 1<sup>st</sup> respondent as at 13.12.2019. The making of returns on money received, list of assistance received from any source, list of liabilities and assets as at 31<sup>st</sup> of December of the preceding year, and on a general statement of all receipts and expenditure during the preceding year is mandatory per section 43 of the Labour Relations Act, 2007.

The Court finds that indeed the 1<sup>st</sup> respondent has, on the basis of the material on record, failed to hold the AGM or the NEC meetings and has failed to make annual returns or submit audited accounts as required. The pertinent question is whether failure to make annual returns or failure to make audited accounts or to hold AGM or NEC meetings in the past amounts to a future unauthorised or unlawful expenditure that is amenable to an injunction under section 41(1) of the Act as invoked. The Court answers in the negative. The Court considers that such failures look back to already incurred expenditures (already expended money and in a decayed procedure to incur expenses). The claimants have not established an intended expenditure outside the purposes in section 39 of the Act or proceeding or likely to proceed contrary to the statutory or provisions of the 1<sup>st</sup> respondent's constitution on the procedure to incur expenditure. The Court therefore returns that within section 41(1) of the Act as invoked, there is no established on-going or proposed expenditure that has been shown to be unauthorised or unlawful to be subject of an injunction as prayed for.

While making that finding the Court has carefully considered the claimants' case and it is that the 1<sup>st</sup> respondent has failed to convene meetings and has failed to make annual returns. The Court considers that the legislative framework under the Labour Relations Act, 2007 is clear on the remedies available. Where provisions on annual returns are not made or are inaccurately made, then an offence is committed per section per section 43(5). If the treasurer or other authorised officer fails to render an account as prescribed in the Act, then an offence is committed per section 42(7) of the Act. Section 44 of the Act provides for inspection of union accounts and records and under section 45 obstruction of such inspection amounts to a crime. The Court considers that the cited provisions clearly deal with the remedies and the course of action in event of the lamentations established for the claimants namely failure to convene AGM and NEC, failure to make annual returns and failure to render audited accounts. Section 47 prescribes legal action where it is alleged that union's property or money has been misused and if that is the claimant's case, as it appears, then that path is open. In such circumstances, the claimants have failed to establish unauthorised or unlawful expenditure amenable to a restraining injunction envisaged in section 41(1) of the Act and the application dated 05.02.2020 will fail as unjustified.

The **4<sup>th</sup> issue** is whether the prayers in the application dated 28.08.2020 should be allowed. The prayers are for orders:

1. That pending hearing and determination of the suit herein an injunction do issue restraining the 1<sup>st</sup> respondent, its agents, employees from unlawful misuse of the trade union's account funds.
2. That pending hearing and determination of the suit herein an injunction do issue restraining the 1<sup>st</sup> respondent from suspending the claimants from participating or receiving money from any activity funded by F.I.C.
3. Costs be provided for.

The claimants have invoked section 47 of the Act. The section empowers the Court to order delivery of union's property or money and failing such delivery as may be ordered, order suspension of the union official subject of such an order. In determining the application of 05.02.2020 the Court has already found that the claimants have failed to show the unauthorised or unlawful expenditure. The prayers in the application dated 28.08.2020 are clearly outside the remedies contemplated in section 47 of the Act. The Court considers that the first prayer for injunction will therefore fail in view that the misuse has not been established. While making that finding the Court considers that the claimants have not shown provisions of the 1<sup>st</sup> respondent's constitution on authority or procedure to incur expenditure that may have been breached or application or proposed application of the union funds outside the provisions and purposes in section 39 of the Act.

On the prayer for injunction restraining suspension of claimants from participating in activities funded by F.I.C, the Court considers that the 1<sup>st</sup> respondent has not denied issuing the letter dated 23.07.2020 that in view of the present case, the claimants should not participate or receive the funds in issue. The Court considers that the claimants cannot be victimised and precluded from union activities on account of filing the present case. The Court finds that the filing of the suit was the claimants' right to access justice and in absence of any other material rendering the suit an abuse of court process or frivolous or vexatious or scandalous, the Court returns that the claimants have established a *prima facie* case for grant of the second injunction as prayed for.

To answer the **5<sup>th</sup> issue** for determination the Court returns that the claimants are separate persons from the 1<sup>st</sup> respondent which is a body corporate under section 21 of the Labour Relations Act, 2007. The Court finds that, by suing the 1<sup>st</sup> respondent, the respondents have failed to show that the claimants were essentially suing themselves and no abuse of court process or breach of public policy or interest has been established against the claimants in that regard or as urged for the respondents.

To answer the **6<sup>th</sup> issue** the Court returns that in view of the parties' respective margins of success, each will bear own costs of the two applications and of the two preliminary objections.

In conclusion the applications and the preliminary objections are hereby determined with orders:

- 1) Both preliminary objections dated 10.03.2020 and 16.09.2020 are dismissed.
- 2) The application dated 05.02.2020 is dismissed.
- 3) The application dated 28.08.2020 is allowed to the extent that there is hereby issued an injunction, pending the hearing and determination of the suit, restraining the 1<sup>st</sup> respondent by itself or by its officials, its officers or agents, from suspending the claimants or any of the claimants from participating or receiving money from any activity funded by F.I.C.
- 4) Each party to bear own costs of both preliminary objections and both applications now determined.

**Signed, dated and delivered by video-link and in court at Mombasa this Friday 29<sup>th</sup> January, 2021.**

**BYRAM ONGAYA**

**JUDGE**