



**REPUBLIC OF KENYA**

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

**CAUSE NO.E052 OF 2021**

- 1) MITAWA SAMORA OKEKE
- 2) STANLEY ALIGURA KIVAZE
- 3) EMOJEL JOSEPH
- 4) SAUL NABUKWESI
- 5) WYCLIFFE NYONGESA
- 6) JOSEPH WABOMBA
- 7) ABEL IDEWA OSIEL
- 8) KENNETH OKIRU ALMAS
- 9) PAUL NYUKURI WEKESA
- 10) EMMANUEL APUYA
- 11) JUMA BLASIO
- 12) HILDA AOKO
- 13) PETER OTIENDE
- 14) DAVID KALOKI
- 15) JOSAIH MUKEKU
- 16) PETER KARIUKI
- 17) ERICK OLIMA
- 18) THOMAS NDWIGA
- 19) CAROLYNE VURIGWA
- 20) CHARLES MUTULA
- 21) KADENYI JACQULINE
- 22) JIMMY TINGA
- 23) SAMUEL ONGAGA
- 24) ESTHER GICHUKI

25) RESTETUTA JUMA

26) LODRICK INYUMBA.....CLAIMANTS

VERSUS

WYCLIFFE SAVA MUNDU .....1<sup>ST</sup> RESPONDENT

PATRICK SHIKUKU.....2<sup>ND</sup> RESPONDENT

PETER K. LOLMODOONI .....3<sup>RD</sup> RESPONDENT

KENYA HOTEL & ALLIED WORKERS UNION.....4<sup>TH</sup> RESPONDENT

RULING

The claimant filed application and Notice of Motion dated 21<sup>st</sup> January, 2021 under the provisions of article 41(1), 22(1) and (2) of the Constitution, section 34(4), 39(a), 41(1), 42 and 47 of the Labour Relations Act, and Rule 4(1), 5(1), 17(1), (5), (6) of the Employment and Labour Relations Court (Procedure) Rules and seeking the following orders;

1. Spent.

2. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents be ordered to cease from conducting both National and Regional Elections for Officer Bearers of the 4<sup>th</sup> respondents slated for 2<sup>nd</sup> and 6<sup>th</sup> February, 2021 and on any other date thereon pending the hearing and determination of this application.

3. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents be ordered to cease from transacting any business on behalf of the 4<sup>th</sup> respondent not limited to transacting on Account No.024293827336 Equity Bank Harambee Avenue pending the hearing and determination of the application.

4. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents herein be ordered to pay all the accrued sums of monies due and owed to the Sacco that has been deducted from the salaries of the employees and/or officers as personal savings and loan repayments and remit the same to Jamii Sacco Limited pending the hearing and determination of the application.

5. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents be ordered to audit, pay from the kitty or the 4<sup>th</sup> 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 4<sup>th</sup> respondent employees and/or officers as statutory deductions, and failed to remit regularly pending the hearing and determination of the application.

6. The respondents herein be ordered to convene a National Executive Board meeting pursuant to the provisions of Article 3.4 (vii) (c) and 3.7

(x)(d) of the union's constitution forthwith pending the hearing and determination of the application.

7. The 1<sup>st</sup> respondent be suspended from office for failure 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 Union's

Constitution pending the hearing and determination of the application.

8. Costs of this application be provided for.

The application is supported by the affidavit of Caleb Olum and on the grounds that the respondents are interfering with the employees' rights of fair labour practices and to a reasonable working conditions as envisaged under article 41 of the constitution and have failed to prudently utilise the union funds pursuant to section 39 of the Labour Relations Act (LRA) and hence causing accumulation of debts which includes office rent arrears, salaries for employees and officers of the trade union.

Other grounds in support of the application and that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents continue to withhold monies in has deducted from its employees and officers in respect of personal savings and loan repayments without remitting the same to Jamii Sacco Limited to which its employees and officers are members. These respondents have also failed to remit statutory deductions which include NSSF and NHIF that it deducts from the salaries of its employees and officers to the relevant authorities and which action contravenes section 19(4) of the Employment Act.

That the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents have refused to perform their duties pursuant to article 3.7(x)(d) of the union constitution to convene the National Executive Board Meeting to date for the last 4 years and hence they continue to violate the union constitution with impunity.

In his Supporting Affidavit, Caleb Olum avers that he is a former employee of Nairobi Serena Hotel and a paid up member of the 4<sup>th</sup> respondent and is conversant with the issues in dispute herein and is aware that the respondents have failed to convene the National Executive Board Meeting for the last 4 years and despite request to convene has failed to abide. The last such request was vides letter dated 28<sup>th</sup> September, 2020.

Mr Olum also avers that the 2<sup>nd</sup> respondent has been making statutory deduction from the salaries of its employees and officers but has failed to remit the same to the relevant authorities who include the NSSF and NHIF. The 2<sup>nd</sup> respondent has also continued to make deductions with respect of loan repayments and personal savings from the salaries of its employees and officers but has failed to remit to Jamii Sacco Society Limited which the employee and officers are members.

The 1<sup>st</sup> respondent is duty bound to ensure that the 2<sup>nd</sup> respondent fully adheres to the Rule of Law and which duty conferred on him by the mandatory provisions of 3.7 article X(x) of the union constitution but has completely breached such duty and failed to implement the constitution. Such conduct has led to loss of financial loss to the 4<sup>th</sup> respondent where it is forced to pay penalties for late payments and late non-remittances and the orders sought should issue.

In reply, the respondents filed the Replying Affidavit of the 1<sup>st</sup> respondent, Wycliffe Sava Mundu and which affidavit is filed contrary to the provisions of section 5 of the Oaths and Statutory Declarations Act and which requires that;

***Every Commissioner for Oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.***

The place where the oath is taken is not stated.

The deponent, Wycliffe Sava Mundu, the 1<sup>st</sup> respondent notes that the Affidavit is drawn and filed by 4<sup>th</sup> respondent; the place where such oath was taken is not stated. See **Edwin K Too versus Paul K Sitienei [2018] eKLR** and in the case of **Regina Munyiva Ndunge versus Kenya Commercial Bank Limited (2005) eKLR**;

*Every Commissioner for Oaths before whom any oath or affidavit is taken or made ... shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.'*

The affidavit is not properly commissioned. It is not an affidavit at all. It is irregular. It is hereby struck out.

Both parties attended court and made oral submissions.

The claimants as applicants submitted that the Replying Affidavit by the respondents is irregular as filed contrary to the law and should be struck out. They are employees and officers of the 4<sup>th</sup> respondents and there is a list from the Registrar of Trade Unions which confirms that they are paid up members of the 4<sup>th</sup> respondent.

The claimants also submitted that the respondents have violated the law and the union constitution where they receive subscriptions and made statutory deductions and loan repayments but have failed to make the remittances as required for NSSF and NHIF and Jamii Sacco which is in abuse of office, the law and the union constitution. The due elections of the 4<sup>th</sup> respondent should be stopped and operation of union accounts stopped to prevent further prejudice to the claimants.

Mr Simiyu for the respondents submitted that the claimants have filed a similar application ELRC 834 of 2020 and seeking similar orders as herein and the orders sought are similar to what is sought in the main claim and if granted, the entire claim shall be spent without giving the respondents a hearing.

Mr Simiyu also submitted that the 25 claimants are not members of the respondent and there is no evidence in this regard to justify the grant of the orders sought. The claimant is filed contrary to section 47 of the Labour Relations Act and in the absence of membership to the 4<sup>th</sup> respondent; these are strangers to claim as sought. The claimants seek to stop election of 4<sup>th</sup> respondent without proof that these elections are unlawful.

Article 15 of the 4<sup>th</sup> respondent constitution has not been violated. Section 43 of the Labour Relations Act has not been violated.

That Caleb Olum filed ELRC 370 of 2020 on the same cause of action and this is pending for directions on 3<sup>rd</sup> February, 2021 and the application before court is in abuse of the court process.

#### Determination

On the application before court and the submissions of the parties, several matters emerge for determination;

Whether the orders sought should issue;

The standing of the claimants; and

The Replying Affidavit of the respondents.

Before delving into the nature of orders sought, the standing of the claimants is imperative to address.

The instant suit is supported by the Verifying Affidavit of Caleb Olum. He defines himself as a *former employee* of Nairobi Serena Hotels. There are 26 claimants listed in the suit. Caleb Olum is not part of the 26 claimants. Under paragraph 1 of the Memorandum of Claim the claimants are defined as follows;

*The Applicants/Claimants herein are adults of sound mind working in the Hotel Industry and fully paid up members of Kenya Hotels & Allied Workers Union as envisaged under the Union's Constitution and whose address for purposes of this suit shall be ...*

Caleb Olum not being part of the claimants and the listed claimants being represented by their advocates, he lacks the standing to file a Verifying Affidavit over matters of the claimants. Whether a former employee, a paid up member of the 4<sup>th</sup> respondent or not, the right-holders being the listed claimants and who have their legal representative, Caleb Olum cannot purport to confirm the claims made for and on their behalf.

Section 22 of the Employment and Labour Relations Court Act, 2011 provides as follows;

## **22. Representation before the Court**

*In any proceedings before the Court or a subordinate Employment and Labour Relations Court, a party to the proceedings may act in person or be represented by an advocate, an office bearer or official of the party's trade union or employers' organisation and, if the party is a juristic person, by a director or an employee specially authorised for that purpose.*

Representation before this court must be as follows;

- a party acting in person;
- be represented by an advocate,
- an office bearer or official of the party's trade union or employers' organisation; and
- a corporate be represented by a director or employee authorised for that purpose.

Caleb Olum neither of the above. He is not a claimant herein as the claimants are represented by the firm of Cheptumo & Co. Advocates.

Further to the above, where a suit is premised under the provisions of the Labour Relations Act, 2007 as herein and where the claimants rely on the provisions of sections 34, 39, 41, 42 and 47 of the Labour Relations Act, 2007 a suit filed thereof must abide the provisions of the Act. a representative suit must be filed pursuant to section 22 of the Employment and Labour Relations Court Act, 2011 or through an *Authorised representative* of a trade union and who under section 2 of the Labour Relations Act is defined as;

**“authorised representative” means—**

- (a) *the general secretary of a trade union;*
- (b) *an employer or the chief executive officer of an employer;*
- (c) *the secretary of a group of employers;*
- (d) *the chief executive or association secretary of an employers' organisation;*
- (e) *any person appointed in writing by an authorised representative to perform the functions of the authorised representative;*

Caleb Olum is neither of the above. He has not submitted any letter by the authorised representative to perform the functions of such office.

A former employee, a paid up member of a trade union is not an authorised representative allowed to represent other employees as done in this matter.

The Memorandum of Claim is therefore supported by a non-suited person. This is irregular and cannot be cured through any form. Caleb Olum cannot rely on Rule 9 of the Court Rules to seek and represent or urge this suit for and on behalf of the stated persons as he is not among these persons as a claimant.

The suit has no foundation. It is irregular on all fronts. It must be struck out.

On the first issue, set out above, the suit being irregular the orders sought cannot issue. These are lost with the suit.

On the third issue, despite the 1<sup>st</sup> respondent's Replying Affidavit being irregular and defective, on the oral submissions, there are relevant matters which have been brought to the attention of the court.

*That there exists ELRC No.370 of 2020*

*That there exists ELRC No.834 of 2020*

And that these matters arise from the same cause of action and have not been determined.

**Nairobi Cause No.370 of 2020** is filed by **Caleb Olum & 15 Others versus Wycliffe Sava Mundu and Kenya Hotels & Allied Workers Union** and the cause of action relates to the 4<sup>th</sup> respondent herein with regard to its operations on membership, deduction of union dues, operation of various bank accounts, statutory deductions and remittances and which matter is currently pending before court and coming up on 10<sup>th</sup> February, 2021 before Onyango, J. **Nairobi Cause No. 834 of 2020** is filed by **Mitawa Samora Okelo & 26 Others versus Wycliffe Sava Mundu and Kenya Hotels & Allied Workers Union** and the issues in dispute is the holding of the National Executive Board Meeting; the deduction and remittances of statutory deductions to NSSF, NHIF and PAYE; repayment of loans to Jamii Sacco Limited. This matter is paled before court on 22<sup>nd</sup> February, 2021 before Nduma, J.

Save for the claimants being slightly different in these suits, the issues in dispute revolve around the same matters of convening the National Executive Board Meeting; the affairs of the 4<sup>th</sup> respondent in membership and payment of union dues; payment of statutory deductions and remittances; and repayment of loans to Jamii Sacco Limited.

In the instant suit, the final orders sought in the Memorandum of Claim are a replica of what is sought in **Cause No.370 of 2020** and in **Cause No.834 of 2020**. The three

(3) suits are before different Judges. To deal and address these suits separately would result in issuance of conflicting orders.

To isolate the suits and issue orders herein as sought and with regard to the same matter(s) already before court and due for hearing by a different Judge, in my view, would result in the issuance of conflicting orders relating to the same respondents and make it cumbersome to enforce/ compliance. Where the same Judge and court is able to have the advantage of addressing all files together, the ends of justice shall be reached. The final orders issued with regard to the employees, officers and or members of the 4<sup>th</sup> respondent trade Union and herein the 4<sup>th</sup> respondent relates to the same issues and or matters in dispute.

For the ends of justice to be achieved, this matter now struck out shall be brought to the attention of Judges presiding in Cause No.370 of 2020 and coming up before Onyango, J on 10<sup>th</sup> February, 2021 and Cause No.834 of 2020 coming up before Nduma, J on 22<sup>nd</sup> February, 2021.

it is only proper to place all the files together before the same Judge.

**Accordingly, on the analysis and findings above, the suit herein is struck out save;**

- a) **The matter herein and ORDERS above shall be brought to the attention of Judges presiding and be placed in Cause No.370 of 2020 and coming up before Onyango, J on 10<sup>th</sup> February, 2021 and Cause No.834 of 2020 coming up before Nduma, J on 22<sup>nd</sup> February, 2021;**
- b) **All parties in Cause No.370 of 2020 and Cause No.834 of 2020 shall be served with Orders and directions herein; and**
- c) **No orders on costs.**

**Orders accordingly.**

**Delivered in open court at Nairobi this 2<sup>nd</sup> day of February, 2021.**

**M. MBARU**

**JUDGE**

**In the presence of:**

**Court Assistance: Okodoi**

..... and .....