



IN THE REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
ELRC. CAUSE NO. 370 OF 2020

CALEB ODUOR OLUM.....1st APPLICANT
WASHINGTON OKUMU ANDIA.....2nd APPLICANT
BERNARD OCHEING.....3rd APPLICANT
PIUS MUTEYITSI.....4th APPLICANT
MARTIN OZUNGU.....5th APPLICANT
FEDWITH OUKO.....6th APPLICANT
FRANSIS 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

-VERSUS-

WYCLIFFEE SAVA MUNDU.....1st RESPONDENT
KENYA HOTELS & ALLIED
WORKERS UNION.....2nd RESPONDENT

RULING

1. This ruling is in respect of the Claimants application dated 19.2.2021 which seeks the following orders:

(a) THAT the application be certified urgent and service of this application be dispensed with ex parte.

(b) THAT the 1st and 2nd Respondent(s) are hereby ordered to cease from conducting both National and Regional Elections for Office bearers of the 2nd Respondent and the Registrar of Trade Unions be restrained from issuing any certificate to purported elected office bearers of the 2nd Respondent pending the hearing and determination of the Application.

(c) THAT the 1st and 2nd Respondent(s) are hereby ordered to cease from transacting any business on behalf of the 4th Respondent not limited to transacting on **Account No. [....]** Equity Bank Harambee Avenue pending the hearing and determination of the application.

(d) THAT the 1st and 2nd Respondent(s) herein is hereby forthwith ordered to pay from the kitty of the 2nd Respondent, all the accrued sums of monies due and paid to the Jamii 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 Society Limited pending the hearing and determination of the application.

(e) THAT the Respondent (s) herein be and are hereby 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

(f) 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 Union's Constitution pending the hearing and determination of the application

(g) THAT costs of this Application be provided for.

2. The application is supported by the Affidavit sworn on 19.2.2021 by Mr. John Ogallo Oyugi, the 16th Applicant and it is opposed by the Respondents vide the Replying Affidavit sworn by the 1st Respondent on 10.3.2021. The application was disposed of by written submissions.

APPLICANTS CASE

3. In brief the Applicants contends that the Respondents are grossly interfering with the employees' right to fair labour practices and reasonable working conditions as envisaged under Article 41(1) and (2) of the Constitution, with impunity; that the Respondents have failed to prudently utilize the unions funds as envisaged under section 39 of the Labour Relations Act and thereby causing accumulation of debts including office rent arrears, salaries for employees and officers of the union; that the Respondents have and continuous to withhold monies deducted from employees and officers in respect of personal savings and loan repayments with Jamii Sacco Limited; that the Respondents have failed to remit statutory deductions made from the employees and officers including NSSF and NHIF; that the Respondents have refused to perform their duties under section 37 Article X (d) of the Union's Constitution, by failing to convene National Executive Board for four (4) years; and that the Respondents conduct is in gross violation of the Constitution of the trade union.

4. The Applicants submitted that they are entitled to the injunction sought because they have met the threshold set out in **Giella v Cassman Brown[1973]EA 358** namely, established a prima facie case with probability of success; demonstrated that they will suffer irreparable harm if the order is denied; and that the balance of convenience favours them.

5. They contended that the Respondents violated the union's Constitution by failing to hold any National Executive Board for (4) four years until 25.2.2021 when the first meeting was held. In their view, the said violation is proof of a prima facie case.

6. As regards irreparable harm, the Applicants contended that the Respondents intend to withdraw all the money held in the 2nd Respondents account and fail to issue a statement to that effect if the orders sought are denied. Therefore, according to the Applicants the suit will be rendered nugatory and moot.

7. As regards the balance of convenience, the Applicant submitted that the court should balance between sustaining the prima facie case established, and preventing trial by failing to preserve the substance of the suit pending trial. According to the Applicant, the failure to grant the order sought will lead to destruction of the substance of the suit because the impugned election process will be concluded and money will be withdrawn from the account of the union.

RESPONDENT'S CASE

8. The Respondents opposed the application on grounds that it is defective since it seeks to amend the application dated 22.5.2020 without leave of the court; that the application seeks for orders against the Registrar of Trade Unions who is not a party to the suit; that Order 2 is overtaken by events because the regional elections have already taken place; that Order 2 also seeks to stop National Elections where the 1st Applicant is participating as a candidate for the position of the Secretary General; that Order 3 cannot be granted because that would ground the union activities and prejudice the services to members; that the National Executive Board met on 18.2.2021 and the 1st Applicant attended; and that the meeting resolved to appoint a committee to investigate the alleged non-remittance of statutory deductions including those for the Jamii Sacco Society.

9. In their submissions, the Respondents reiterated that Order 2 is overtaken by events since the regional elections were done and concluded; that prayer 5 is overtaken by events because the National Executive Board held a meeting on 18.2.2021; and that order 4,5, and 6 were raised by the Applicants with the Registrar of Trade Unions who made a decision on 30.6.2020 which was neither opposed or appealed against.

10. The Respondents further submitted that the Applicants have filed many suits on the same issues and the application and entire suit is defective and brought in bad faith to amend the application and the suit dated 22.5.2020 out of time and without leave of the court. In the alternative, they contended that the motion and the suit are *sub judice* because the issues raised are before other courts.

11. They reiterated that the orders sought against the Registrar of Trade Union, who is not a party to the suit cannot issue because that would be against the rules of natural justice. They maintained that the Registrar has already made a verdict on the matters raised herein and the decision cannot be reversed except by way of an appeal to this court under section 30 of the Labour Relations Act.

ISSUES FOR DETERMINATION

12. Having considered the application, affidavits and submissions filed, the following are the issues for determination.

- (a) **Whether all the orders sought are spent**
- (b) **Whether the application is fatally defective and incompetent**
- (c) **Whether the reliefs sought should be granted.**

ARE ALL THE ORDERS SPENT

13. I have carefully considered all the orders sought in the motion, and it is clear that they were intended to last till the hearing and determination of the application. The application was heard *ex parte* under certificate of urgency on 24.2.2021 by Onyango J while on duty and she did not grant the same, but instead fixed the application for inter parties hearing on 11.3.2021.

14. On 11.3.2021, the Respondents objected to granting of any interim orders and the parties agreed to dispose of the application by written submissions. The matter was then fixed for mention to confirm filing of submissions on 15.3.2021 when again I fixed the motion for ruling on 17.3.2021.

15. In view of the foregoing, I would say that the interim orders were never granted and they are now spent. There being no orders sought pending the hearing and determination of the suit, I proceed to hold that the entire application is spent and therefore its life has drastically dived to a final end.

16. In view of the foregoing observations, there is no need to determine the other two issues framed above. Consequently, the application is dismissed with costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 17TH DAY OF MARCH, 2021.

ONESMUS N. MAKAU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE