



**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**

**WAREHOUSE WORKERS UNION.....1<sup>ST</sup> RESPONDENT**

**REGISTRAR OF TRADE UNIONS.....2<sup>ND</sup> RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 12<sup>th</sup> March, 2021)

**RULING**

The claimants filed an urged notice of motion on 25.02.2021 through Khaminwa & Khaminwa Advocates. The application was under section 41 of the Labour Relations Act No.14 of 2007, section 1B, 3 of the Civil Procedure Act and any other enabling provisions of law. The claimants prayed for orders as follows:

- 1) That the application herein be certified as urgent and service be dispensed with in the first instance.
- 2) That pending hearing and determination of the application or claim herein a temporary injunction does issue restraining the 1<sup>st</sup> respondent or its officials and employees from effecting an annual conference scheduled on 28.02.2021 at Nairobi.
- 3) That pending the hearing and determination of the application or claim herein an injunction does issue restraining the 1<sup>st</sup> respondent or its officials and employees from further issuing any annual conference notices to claimants contrary to the registrar of trade unions.
- 4) Any order the Honourable Court may deem fit and just to grant.

The application was based on the attached supporting affidavit of Hillary Mwinga Gonzi and upon the following grounds:

- 1) That the 1<sup>st</sup> respondent officials and employees issued a letter dated 01.02.2021 and served the same letter to all national executive council members including the claimants herein on 23.02.2021 and 24.02.2021 to summon them to attend an annual conference on 28.02.2021 at Tulip Institute Commercial Hall, Nairobi at the expense of all the members and claimants herein to whom have 3 days to make campaigns to be re-elected as members of the union, the same having been insufficiently served.
- 2) The 2<sup>nd</sup> respondent has issued a notice on 25.09.2020 notifying all registered trade unions, employers organizations and

federations of the elections scheduled dates that were to be adhered to by the 1<sup>st</sup> respondent herein and the 1<sup>st</sup> respondent has gone contrary to the notice issued by the 2<sup>nd</sup> respondent being the Registrar of Trade Unions.

3) That the above notice issued by the 1<sup>st</sup> respondent is contrary to Rule 6 clause (iii) which states that a four-week notice needs to be issued to members inviting them to the conference and that was not the case since the claimants were only given 3 days' notice.

4) That the 3 days' notice does not give the claimants enough period to prepare for elections.

5) That the 1<sup>st</sup> respondent violated Rule 17 of the union constitution by asking the members to meet their finances at their cost contrary to the union constitution that the same be catered by the 1<sup>st</sup> respondent.

6) That the orders sought are fair and just to be issued to the interest of the claimants.

On 25.02.2021 the Court considered the application in absence of the parties and certified it urgent to be served the same date for inter partes hearing or further orders and directions on Friday 26.02.2021 at 9.00am. The claimant's and 2<sup>nd</sup> respondent's counsel attended Court on 25.02.2021 and upon hearing their respective positions, the Court ordered thus:

1) That pending the inter-partes hearing, the 2<sup>nd</sup> respondent or her representative to attend the meeting said to be fixed for 28.02.2021 at Tulip Institute Commercial Hall, Tom Mboya Street, Nyambane House, 1<sup>st</sup> Floor with a view of ascertaining and guiding the 1<sup>st</sup> respondent with respect to compliance with the 2<sup>nd</sup> respondent's circular Ref. No.ML&SP/TU/ELECTION/2021 dated 25.09.2020.

2) That pending the inter-partes hearing, the applicants are at liberty to attend the meeting fixed for 28.02.2021 herein with a view of raising their grievances against the 1<sup>st</sup> respondent accordingly.

3) That the applicants to serve a hearing notice upon the 1<sup>st</sup> respondent for inter-partes hearing of the application on 03.03.2021 at 9.00a or soon thereafter as will be called out on the video link to be provided by the Deputy Registrar.

4) That costs in the cause.

The 2<sup>nd</sup> respondent's representative appointed Grace Mweresa, Assistant Labour Commissioner, to attend the meeting of 28.02.2021 on behalf of the 2<sup>nd</sup> respondent. The report of the proceedings was filed in Court on 03.03.2021 by Martin Mwandeje, learned Senior Litigation Counsel, for Attorney General, for 2<sup>nd</sup> respondent. The report shows that in accordance with the Court order the Assistant Labour Commissioner invited grievances. In the process one member Boniface Mugoya (National Assistant Treasurer) said that he is not participating and he would not sign anything including the attendance register and before walking out he was requested to present a copy of his petition but he declined to do so. Further, in the process another member (Albert Nyongesa) followed the said Boniface, walking away from the meeting, and refused to sign the attendance register. The Assistant Labour Commissioner reports that no grievances were therefore raised and she came to learn that the two members who had walked away from the meeting were part of the claimants in the suit an order had been made herein. The report shows that the members present at the conference were given chance to raise grievances and those who spoke stated that they were satisfied with the conduct of the conference. The report concludes thus, **"I confirmed that the union strictly complied with its constitution on matters elections, thus, I continued with the exercise and I completed the elections of new officials at 2.00pm. I confirm that members present conducted themselves properly and elected their officials democratically. As there was no more business, after I completed this assignment, I left the venue."** The 1<sup>st</sup> respondent filed on 02.03.2021 the replying affidavit of James Onkoba Tongi, National General Secretary. The 1<sup>st</sup> respondent opposed the application upon the following grounds:

1) The matters raised in the application dated 25.02.2021 do not flow from the claimant's statement of claim pending before the Court in the instant suit. The claim in the suit is about alleged misuse of union funds based on section 41 of the Labour Relations Act, 2007 and in hearing and determining the suit the Court will at no time deal with the issue of 1<sup>st</sup> respondent's elections now subject of the present application.

2) The application concerns sections 34 and 35 of the Labour Relations Act, 2007 and in line with the 2<sup>nd</sup> respondent's circular dated 25.09.2020 and there is no substantive claim about the 1<sup>st</sup> respondent's 2021 elections. The circular was issued long after the filing of the suit herein on 05.02.2020. and the application is misplaced, premature, a non-starter, incompetent, frivolous, incurably defective in form and substance, an abuse of court process and should be struck out or dismissed with costs.

3) The application is an affront and violation of the overriding objective of the Labour Relations Act which requires that actions are taken after the 2<sup>nd</sup> respondent has made a decision on matters of union elections. Any decision made by the 2<sup>nd</sup> respondent including registration of union elections or elected officials shall be appealed pursuant to section 30 of the Labour Relations Act, 2007 by any aggrieved party. The 2<sup>nd</sup> respondent had not made any decision about the elections of 28.02.2007 and no appeal had therefore been made with respect to the 1<sup>st</sup> respondent's 2021 elections. The application was therefore premature.

4) In convening the conference of 28.02.2021, the 1<sup>st</sup> respondent had complied with the circular by the 2<sup>nd</sup> respondent dated 25.09.2020 and the 1<sup>st</sup> respondent's registered constitution.

5) The 1<sup>st</sup> respondent held its NEC meeting on 24.01.2021 and the core agenda was the circular dated 25.09.2020. The 1<sup>st</sup>

respondent resolved that elections will be conducted accordingly starting with its branches. The Nairobi branch elections were fixed and carried out on 07.02.2021 while those for Changamwe branch were fixed and carried out on 14.02.2021. The national elections were fixed for 28.02.2021. The resolutions on elections were communicated to all union members, the 2<sup>nd</sup> respondent and the Labour Commissioner. The 1<sup>st</sup> respondent's General Secretary, per the resolutions, issued the notice dated 01.02.2021 inviting all National Executive Council (NEC) Members to attend the Annual Conference to be held on 28.02.2021 and the notice was forwarded to the 2<sup>nd</sup> respondent and the Labour Commissioner. Rule 6(1) (ii) of 1<sup>st</sup> respondent's constitution mandates NEC to determine date and venue of the Annual Conference and Rule 6(1) (iii) mandates the General Secretary to issue Annual Conference notice to a maximum of 4 weeks and there is no minimum number of notice days as per the 1<sup>st</sup> respondent's registered constitution.

6) The term of the current office bearers will expire on 03.03.2021 and so the 1<sup>st</sup> respondent carried out its national elections on 28.02.2021. The 6<sup>th</sup> and 2<sup>nd</sup> claimants were present but they declined to sign attendance register or to participate in the elections. The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> claimants did not attend and did not send apologies. There were no grievances made at the Annual Conference.

7) The 1<sup>st</sup> respondent shall forward the delegates' resolutions and elections outcomes for further action per the circular dated 25.09.2020.

8) The aim of the present application was calculated for the claimants to avoid going to elections. And the outcome of the elections can only be challenged by way of an appeal as provided for under the Labour Relations Act, 2007.

The claimants and the 1<sup>st</sup> respondent filed their respective submissions. The Court has considered the parties' respective positions and the material on regard for and against the application and makes findings as follows:

**First**, consequential to the Court order given on 26.02.2020, the claimants were given an opportunity to ventilate their concerns and grievances at the Annual Conference that was fixed for 28.02.2020. Despite that order, some of the claimants decided not to attend while the two who attended (as per the 2<sup>nd</sup> respondent's report of the proceedings on record) declined to participate in the Annual Conference or to raise their concerns and grievances. In such circumstances, the Court returns that the claimants cannot be said to have established a *prima facie* case with a high probability of success for grant of a temporary injunction based on their alleged grievances. The Court therefore finds that the claimants have failed to establish the threshold for grant of a temporary injunction.

**Second**, the claimant's grievance was that the requisite notice of at least 4 weeks for the Annual Conference had not been given. The 1<sup>st</sup> respondent's case is that 4 weeks is the maximum and not minimum period of the prescribed notice. The Court has considered Rule 6(1) (iii) of the 1<sup>st</sup> respondent's constitution. It provides thus, "**The annual conference is convened by the National General Secretary in consultation with the National Executive Council by giving a maximum of four (4) weeks' notice in writing inviting the members from each of the branches of the union.**" As submitted and urged for the respondent, the 4 weeks is a ceiling period and not a floor period and the Court finds that the claimants were misconceived about the scope, meaning and effect of the provision. Their grievance in that respect will therefore collapse.

**Third**, it is submitted for the 1<sup>st</sup> respondent that the application is an abuse of the Court process because it is a new cause of action and not based on the main memorandum of claim in the present suit. The claimants have not addressed the issue in their submissions. The Court has perused the claims and the prayers in the memorandum of claim. The matters as pleaded do not relate to elections of the 1<sup>st</sup> respondent's branch and national officials, and, as submitted for the 1<sup>st</sup> respondent the parties are bound by their own pleadings. If the temporary injunctions were granted, the issues in the application would not be addressed and determined after the full hearing of the main suit because the issues about elections are not pleaded at all. The Court therefore returns that indeed the application amounted to an abuse of court process in so far as it was based on a new cause of action requiring the filing of a fresh suit. The application being based upon a cause of action not being the cause of action pleaded in the instant suit, the application is liable to fail as it amounted to an abuse of court process.

**Fourth**, the Court finds that as submitted for the 1<sup>st</sup> respondent, the suit was premature. The claimants invoke section 34 (4) of the Labour Relations Act, 2007 which states thus, "**Disputes arising or connected directly or indirectly to elections held under this section may be referred to the industrial court.**" The Court has considered the provision and it is clear that the disputes under the section would relate to an election already held and not an election not yet held as was the circumstance in the instant application. The Court further considers that the Labour Relations Act, 2007 has elaborate provisions in section 34 of the Act empowering the 2<sup>nd</sup> respondent to make an inquiry into union elections and in the opinion of the Court, failure to exhaust such statutory procedure is an impetus to declining the application. As submitted for the 1<sup>st</sup> respondent, the Court finds that the application was therefore premature.

**Fifth**, it was submitted for the claimants that the 1<sup>st</sup> respondent's General Secretary issued the letter dated 30.12.2020 appointing Samson Ongera to represent the 1<sup>st</sup> respondent in the suit. It was further submitted that it was doubtful whether Samson Ongera had been considered and so appointed by the 1<sup>st</sup> respondent's NEC as per Rule 8(2) (b) of the 1<sup>st</sup> respondent's constitution. The Court considers that the replying affidavit was by the General Secretary, James Onkoba Tongi and the claimants admit that the same James Onkoba Tongi had issued the letter dated 30.12.2020 appointing Samson Ongera to represent the 1<sup>st</sup> respondent in the suit. Accordingly, the Court finds that there is no reason to doubt the authority of the said Samson Ongera to appear in the suit for the 1<sup>st</sup> respondent and on a balance of probability, the authority to represent is therefore valid. The Court further considers that any dispute about the procedure leading to appointment of Samson Ongera to represent the 1<sup>st</sup> respondent is a matter not pleaded in the application and is beyond the scope of the present application. Further, as submitted for the 1<sup>st</sup> respondent, under section 2 of the Labour Relations Act "**authorised representative**" means the general secretary of a trade union or any person appointed in writing by the general secretary. There is no dispute that Samson Ongera was appointed in writing by the 1<sup>st</sup> respondent's General Secretary to represent the 1<sup>st</sup> respondent in the suit and the Court finds that the appointment was lawful.

In conclusion, the application by the notice of motion dated and filed on 25.02.2021 is hereby dismissed with costs and parties to take further steps towards the expeditious determination of the main suit.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 12TH MARCH, 2021.**

**BYRAM ONGAYA**

**JUDGE**