



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 633 OF 2019

NEWTON F. KIMANTHI.....1ST CLAIMANT

DAMON G. KWAARA.....2ND CLAIMANT

-VERSUS-

SETH PANYAKO.....1ST RESPONDENT

JOSEPH NGWASI.....2ND RESPONDENT

KENYA NATIONAL UNION OF NURSES.....3RD RESPONDENT

AND

REGISTRAR OF TRADE UNIONS.....INTERESTED PARTY

RULING

1. The 1st and 3rd Respondents filed a Notice of Motion dated 2.3.2020 seeking the following orders :

a. Spent.

b. That an Order be and is hereby issued directing the interested party (registrar of Trade Unions) to adopt the resolutions of the 3rd Respondent/Applicant Special National Governing Council meeting held on 27.9. 2019 at Wild Waters Mombasa.

c. That an order be and is hereby issued declaring that the temporary order dated 25.9.2019 did not affect the 3rd Respondents/Applicant resolution of the Special National Governing Council held on 27.9.2019 for want of service.

d. That the suit be and is hereby marked as spent.

e. That the costs of this application be provided for.

2. The application is premised on grounds that:

a. Vide a letter dated 29.1.2020, the Applicant forwarded to the Interested Party the Minutes of the Special National Governing Council (SNGC) held on 27.9.2019 and the proposed amendments to the Union's Constitution.

b. The Interested Party declined to register the proposed amendments to the 3rd Respondent's Constitution citing a Court Order that was vacated by this Court through the 1st and 3rd Respondent's application.

c. Despite the fact that the Interested Party was represented in Court and further served with the Court order that vacated the temporary orders issued on 25.9.2019, she continues to rely on orders of the court that were set aside by this Court which are legally void.

d. The Interested Party and the Claimants were duly served with the application letter dated 25.9.2019 which they did not respond to and the Court allowed as unopposed.

e. In a letter dated 10.2.2020 the Interested Party communicated that in absence of any court order, her office had no objection to register the amendments but stated that the temporary order of 25.9.2019 were still in force.

f. The Respondents were not served with the temporary order of 25.9.2019 thus they are not bound by an order they had no knowledge of. Further, the order was sent through email at 8.58 pm by which time the meeting had taken place. Hence, it is overtaken by events.

g. The order automatically lapsed by dint of the mandatory provisions of Order 40 Rule 4 (3) of the Civil Procedure Rules.

h. Vide the letters dated 10.2.2020 and 18.2.2020, the Interested Party purported to raise issues on the resolutions of the SNGC on 27.9.2019 and union amendments which were not pleaded in the Memorandum of Claim.

i. The Interested Party, through a letter dated 29.1.2020, decided that the resolutions reached in the Special National governing Council Meeting are illegal despite there being no such prayer sought by the Claimants.

j. The Claimants are aware that the meeting took place and if the same happened in disobedience of a court order, the only option was for them to pursue contempt proceedings against the Respondents and a declaration that the resolutions of the proceedings were null and void.

k. The suit is defective as it has only been verified by the 1st Claimant.

3. The application was supported by the affidavit of Seth Panyako the 1st Respondent on 2.3.2020 in which he reiterates the grounds set out in the motion.

4. The parties, save for the 2nd Respondent, filed their respective responses to motion which then proceeded by way of written submissions.

5. The Claimants opposed the application vide a Replying affidavit sworn on 1.7.2020 by Newton F. Kimanthi, the 1st Claimant herein. He deposed that the Interested Party's refusal to register the alleged resolutions is a correct interpretation of the law as there was no SNGC meeting on 27.9.2019. Further, if there was any such meeting it was a nullity as it took place in violation of the order issued on 25.11.2019.

6. He contended that they were never served with the application dated 25.11.2019 and were also not aware of the hearing date of 20.2.2020. Therefore, it is not correct to state that they did not file any reply to the application.

7. He contended that the order issued on 25.9.2019 was duly served upon both the Interested Party and the Respondents and this fact was confirmed by the letter dated 10.2.2020. He further contended that there is an admission of service of the order because the Respondent averred that they were served via email on 25.9.2019.

8. He contended that there is admission of contempt by the respondent that SNGC proceeded with a meeting on 27.9.2019, 2 days after service of the order.

9. He averred that they did not plead any issues on the resolutions of the SNGC because by the time they filed the claim on 25.9.2019, the meeting which was to be held on 27.9.2019 had not taken place. He denied there being a meeting on 27.9.2019 as no resolutions were arrived at and if there were any, they could have been annexed to the application.

10. He contended that prayer (b) of the application amounts to the Court interfering with the functioning of the independent office of the Interested Party since if the Interested Party refuses to register changes, the aggrieved party is required to appeal against the decision within 30 days.

11. According to him, the application is premature, defective, incompetent, frivolous and bad in law and that the Respondents seek drastic orders in the application yet they have not filed a response to the claim.

12. The Interested Party, E. N. Gicheha, filed a Replying Affidavit sworn, on 24.6.2020. She deposed that the 1st Respondent made an application to amend the 3rd Respondent's Constitution; that according to the Constitution, an amendment would only be made by a resolution voted upon by secret ballot at a National Referendum and ratified at the National Governing Council or a SNGC.

13. She contended that the Applicants called for a SNGC meeting that was to be held on 27.9.2019 to ratify the amendments; that the Applicant made the invitation of the meeting in respect of Kitui Branch to the Deputy Branch Secretary instead of the Branch Secretary; that the 1st Claimant being the Kitui Branch Secretary moved to Court under Certificate of Urgency in the instant suit and the Court on 25.8.2019 issued an order that a temporary injunction be issued restraining the Respondents or agents from convening and or conducting or proceeding with the SNGC meeting.

14. She contended that her office was on 27.9.2019 served with the Order dated 25.9.2019 stopping the respondents SNGC meeting. She further contended that, notwithstanding the said order, the Respondents went ahead and held the said meeting and served her with a Resolution to amend the Union's Constitution. However, she declined to register the same and notified the Respondents the reason for refusal to the said Court Order.

15. She contended that the Respondents served her with a Court order dated 20.1.2020 vacating the order issued on 25.11.2019, but vide the

letter dated 10.2.2020, she informed the Respondents that she could not register the amendments on the basis of the resolutions passed at a meeting which had been stopped by the Court and advised the Respondents to call for another meeting as the orders had been vacated.

16. She contended that it is surprising that the Respondents filed the instant application while aware that they had not only breached the Union Constitution but were in contempt of Court.

17. In response to the Claimants' and the Interested Party's Replying Affidavit, the 1st and 3rd Respondents filed a Further Affidavit sworn by the 1st Respondent on 12.10.2020 in which he largely reiterated the averments in the supporting affidavit.

18. He further averred that this Court does not have the powers to issue a permanent injunction against the 3rd Respondent as it would amount to interfering with its affairs and administration. He stated that the suit herein seeks to permanently bar the Union from convening any meeting of SNGC which is not possible as it would violate its Constitution, the Constitution of Kenya, the ILO Convention No. 98 and the Labour Relations Act.

19. He contended that the 2nd claimant filed a Petition in **Eldoret Petition No. 6 of 2020** which was aimed at interfering with the administration of the affairs of the 3rd Respondent. That the suit is pending before Abuodha J. who delivered a Ruling on 5.6.2020 to the effect that the filing of numerous suits was an abuse of the court of process as the disputes could be resolved within the union's framework.

20. They contended that the Interested Party's office has been partisan in the *modus operandi* particularly in the manner in which they have chosen to selectively respond to the frivolous claims filed against the 3rd Respondent.

21. They contended that this suit continues to unnecessarily clog the justice system.

1st and 3rd Respondents' submissions

22. They submitted that by declining to register the proposed amendments, this action violated a number of provisions of the Constitution which include Articles 36 and 37. They further submitted that the role of the Interested Party in respect of the governing documents is limited and does not extend to reviewing the merits of the meeting of the SNGC. They further submitted that the decision of the Interested Party is an affront to the right to the 3rd Respondent to run and manage its affairs in the best interests of its members.

23. They argued that the Court ought to take cognisance of Article 159 of the Constitution and compel the Interested Party to register the proposed amendments to the 3rd Respondent's Constitution. They relied on **Anchor Limited v Sports Kenya [2017] eKLR** where it was held that Courts can no longer deploy technicalities as the basis for the decision comes from the Constitution.

24. They maintained that service of the order issued on 25.9.2019 was not effected and the 1st Claimant took no effort to ensure that effective service was undertaken. They relied on **Koinange Investments & Development Ltd v Robert Nelson Ngether [2014] eKLR** where the Court held that service of documents is an important component in the administration of justice and a common aspect in litigation. They also relied on **Omar Shallo v Jubilee Party & another [2017] eKLR** that personal service is the best form of service.

25. They argued that the Interested Party's reference to the Order that was vacated is an invalid position as the orders lapsed and were spent. They relied on the Court of Appeal decision in **Barclays Bank of Kenya Limited v Henry Ndung'u Kinuthia & another [2018] eKLR** where it was held that the importance of Order 40 Rule 6 of the Civil Procedure Rules in furthering the overriding objective was underscored by the High Court in **David Wambua Ngii v Abed Silas Alembi & 6 others [2014] eKLR** and **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR** where it was held that the rule was intended to cure mischief where a party delays in the disposal of the suit and continues to enjoy the injunction.

26. They also relied on **Jason Sore Shikuku v Christopher Naibey Chemengu [2018] eKLR**, **John Biiy v Seth Panyako & 2 others [2019] eKLR** and **Board of Trustees of African Independent Pentecostal Church of Africa Church v Peter Mungai Kimani & 12 others [2016] eKLR** on the effect of Order 40 Rule 6 of the Civil Procedure Rules.

27. They argued that the Interested Party is required to demonstrate impartiality in the discharge of her mandate. They relied on **Shivling Supermarket Limited v Jimmy Ondicho Nyabuti & 2 Others and Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others [2017] eKLR** where it was held that in an application for joinder, an interested party should demonstrate that he/she has an identifiable interest in the subject matter and that this interest must be legal, identifiable or demonstrate a duty in the proceedings which can be identified by the examining the questions involved in the suit.

28. Finally, they submitted that the 3rd Respondent held a successful meeting on 23.10.2020 and that this demonstrates that its functions are being carried out and the Court should not interfere with them. They urged the Court to grant the application.

Claimants' submissions

29. The Claimants maintained that the Respondents were duly served with the Court Order of 25.9.2019 and as such no valid resolutions was passed by the respondents on 27.9.2019. They relied on **HCCC No. 59 of 2005 Trans Nzoia Investment Co. Ltd v Joseph Wanambisi and 4 others** where an extra General Meeting had been held in violation of a Court Order and the Court held that any act that is done in violation of the law is void and that any proceeding which is founded on it is incurably bad.

30. They relied on section 30 of the Labour Relations Act and submitted that the application must fail on grounds that the decision of the

registrar ought to have been challenged by way of an appeal. Therefore they urged the court to dismiss the application with costs.

Interested Party's submissions

31. The Interested Party submitted that under sections 35 (3) and (4) of the Labour Relations Act, it is within her mandate to require the production of relevant evidence of changes and if not satisfied as to the validity of any proposed correction, she may refuse to correct the register. She relied on **Felix Musyoki Sammy & 6 Others v Registrar of Trade Unions & another [2016] eKLR** where the Court held that it is inappropriate to introduce constitutional arguments in purely policy and administrative issues.

32. She further submitted that Articles 36 and 41 (2) (c) of the Constitution provides for the freedom of association and the right to labour relations but Article 24 (1) sanctions the limitation of fundamental rights and freedoms. She relied on **Charles Salano & 9 others (proposers & promoters of Kenya Supermarkets Workers Union (KESMWU) v Registrar of Trade Union & another [2017] eKLR** where the Court held that the right to associate is not one of the fundamental freedoms that cannot be curtailed.

33. She further relied on the decision in **John Githua Mbate & 2 others v Registrar of Trade Unions & another [2018] eKLR** that the right to associate and dissociate must be construed within the narrow confines of the Constitution and the Labour Relations Act.

34. She argued that the Court ought to take cognisance of Article 159 of the Constitution in the context that alternative dispute resolution should be promoted. She further argued that the Union belongs to the members and that the NGC members are listed under Chapter v (3) (i)-(xiv). Therefore, she urged that pursuant to section 35 (3) and (4) of the Labour Relations Act, there is need for a correction of the shortcomings of the resolutions passed since the claimants are members of the body but they were absent from the meeting held on 27.9.2019.

35. She submitted that in the **Barclays Bank of Kenya Limited case**, relied upon by the 1st and 2nd Respondents, the Court also asserted that the mischief that was intended to be cured, in the 12 months lapse of orders, was the delay in disposing suits.

36. To emphasise on the principle of the overriding objective under section 1A of the Civil Procedure Rules, she relied on **Karuturi Networks Limited & another v Daly & Figgis Advocates [2009] eKLR**, **Deepak Chamanlal Kamani & another v Kenya Anti-corruption Commission & 3 others [2010] eKLR**, **Hunker Trading Company Limited v Elf Oil Kenya Limited [2010] eKLR** and **Kenya Commercial Bank Limited v Kenya Planters Co-operative Union & 2 Others [2011] eKLR**.

37. She reiterated that it was within her sound reasoning to decline the registration of the proposed amendments and that the vacated orders did not legalise the events that took place on 27.9.2019. Further, that the union ought to have called for another meeting after the orders were vacated.

38. Finally, she submitted that she followed due process and it was in accordance with the law for her to reject the proposed amendments that were done in contravention of a court order that existed at that time. She submitted that the application should be dismissed with costs.

Issues for determination

39. The main issues for determination are:

- a. *Whether the 1st and 3rd Respondents were served with the Order issued on 25.9.2019.*
- b. *What was the effect of the order issued on 20.1.2020 setting aside the order issued on 25.9.2019?*
- c. *Whether the Interested Party should be compelled to adopt the resolutions of the SNGC held on 27.9.2019.*
- d. *Whether the suit is spent or overtaken by events.*

Whether the 1st and 3rd Respondents were served with the Order issued on 25.9.2019.

40. The 1st and 3rd Respondents contended that they were not served with the order issued on 25.9.2019 and contended that the failure to serve the order within 3 days rendered it null and void by dint of Order 40 rule 6 of the civil Procedure rules. In addition they contended that the order was set aside by the Court on that ground. The claimant maintained that they served the respondents via email and that as at the time of holding the SNGC meeting, the respondents were aware of the said injunction order.

41. In what appears to contradict the averment in the Supporting Affidavit, the respondents averred in their Further Affidavit that the Order was indeed sent to them via email on 25.9.2019 at 8:58 pm, by which time the office was closed; that on 26.9.2019 their offices were locked as they were preparing for the SNGC meeting on 27.9.2019; and that they could only read the email from the office computer when they reported back to the office after the SNGC meeting. Consequently, in their view they had not been personally served with the order by the time the meeting started and ended.

42. Having considered the rival contentions between the parties herein, I must agree that Courts have reiterated that personal service is the best form of service. However, in some instances Courts have allowed substituted service. Under Rule 12(2) of the ELRC Procedure Rules 2016, substituted service is allowed. The rule states as follows:

“(2) Notwithstanding anything contained in this Rule, a party may, with the leave of the Court, effect service of process by any other method.”

43. In this case, the claimants sought leave to serve the application and orders on the 1st and 2nd respondent through substituted service of email and/or their last known address and the leave was granted. Consequently, the court finds that the personal service had been dispensed with after the leave to use other method of effecting service was granted. The said method is provided for under Rules of Procedure for the Court and respondents are presumed to have received the email and became aware of the order issued on 25.9.2019 before the meeting started on 27.9.2019. The reason for the foregoing is that they acknowledged that the email was sent to them on 25.9.2019 at 8.58 pm.

44. In **Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR** the Court of Appeal held as follows concerning service of Court orders:

“Kenya’s growing jurisprudence right from the High court has reiterated that knowledge of a court order suffices to prove service and dispense with personal service for the purposes of contempt proceedings. For instance, Lenaola J in the case of Basil Criticos Vs Attorney General and 8 Others [2012] eKLR pronounced himself as follows:-...

This position has been affirmed by this Court in several other cases including the Wambora case (supra).”

45. It is my finding that the 1st and 3rd Respondents were duly served with the Injunction Order or they knew about the existence of the Order before convening the SNGC held on 27.9.2019 but they deliberately failed to comply with it. Consequently, I decline the invitation by the 1st and 3rd respondent to declare that the temporary injunction issued on 25.9.2019 did not affect the resolutions passed by the SNGC on 27.9.2019 at wild Waters, Mombasa. I further dismiss the contention by the respondents that the order lapsed after 3 days by dint of Order 40 Rule 6 of the Civil Procedure Rules for want of service.

What was the effect of the order issued on 20.1.2020 setting aside the order issued on 25.9.2019?

46. The 1st and 3rd respondents brought the application dated 25.11.2019 seeking to have the temporary orders granted on 25.9.2019 set aside or vacated. The claimants and the interested party were served with the application but they did not oppose it and the Court allowed it as prayed. According to the respondents, the setting aside of the order meant that there was no reason for the Interested Party to refuse to register the resolution of the SNGC meeting of 27.9.2019. However, claimants and the Interested Party are of a contrary view that any resolutions passed during the SNGC meeting on 27.9.2019 were null and void by dint of the Injunction Order issued on 25.9.2019, and as such the setting aside of the said injunction order on 20.1.2020 did not have any effect on the illegal resolutions.

47. In **HCCC No. 59 of 2005 Trans Nzoia Investment Co. Ltd v Joseph Wanambisi and 4 others** Ombija J, held as follows:

“I have been urged on the second limb of the application to declare the extra ordinary Annual General Meeting held on 2nd March 2007 in violation of the court order of 1st March, 2007 null and void and inconsequential. My reaction to this is that if any act is done in violation of the law it is void. If it is void it is in law a nullity. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And any proceeding which is founded on it is also bad and incurably bad. You cannot put something on it and expect it to stay. It will collapse.(see MACFOY V UNITED AFRICA CO.LTD [1961] 3 ALL ER 1169 at page 1172)”

48. The facts of foregoing precedent were on all fours with the instant case and the holding by the Judge in my opinion, resonates well with contention by the claimants and the interested party herein. Consequently, I find and hold that even if the Order dated 25.9.2019 was vacated on 20.1.2020, that never sanitized the respondents’ unlawful resolutions or rendered valid the invalid resolution passed on 27.9.2019 in violation of the injunction order issued on 25.9.2019. The order had restrained the respondent from holding a SNGC meeting pending hearing and determination of the suit but the setting aside order gave room to the respondents to call another meeting even before the suit was determined.

49. It has been confirmed by both the respondents and the Interested Party that another SNGC meeting was held on 23.10.2020 and resolutions passed peacefully. It follows that the respondents are at liberty to follow the procedure set out under section 27 of the Labour Relations Act to have the valid resolutions passed on 23.10.2020 registered and stop pursuing registration of invalid resolutions passed in contempt of court on 27.9.2019 since they amounted to a stillbirth.

50. Section 27 (4) of the Labour Relations Act provides:

“Upon receipt of the notice of change of name or constitution, the Registrar shall give a notice of at least twenty-one days in the Gazette and in three daily newspapers of national circulation inviting any objections to the proposed change of name or constitution by members of the trade union and where any such objection is raised, the Registrar shall investigate the complaint and the grounds relied upon and may—

(a) refer the matter to the Industrial Court;

(b) refuse to accept the proposed amendments; or

(c) make any orders that he may deem fit in the circumstances.”

Whether the Interested Party should be compelled to adopt the resolutions of the SNGC held on 27.9.2019.

51. In view of the foregoing finding that the resolutions of the respondents' SNGC meeting on 27.9.2019 were null and void for being passed in contempt of court, the Interested Party was entitled to decline registration because they were dead on arrival. Having been enjoined as a party to the suit and having been served with the injunction order that stopped the subject SNGC meeting, the Interested Party correctly refused to aid and abate the respondents' contempt of court by engaging in a process of registering an invalid resolution.

52. For the same reason that the resolutions passed by the respondent's SNGC on 27.9.2019 were unlawful, null and void, I find and hold that an order to compel the Interested Party to register the said resolution cannot issue since that is inviting the court to act in vain as there is nothing capable of being registered.

Whether suit is spent or overtaken by events.

53. The 1st and 3rd respondents contended that the suit seeks to permanently restrain them from holding SNGC on 27.9.2019 or any other date thereafter. They further contended that since the said meeting took place on the stated date and thereafter the court vacated the temporary order, the suit is now spent or overtaken by events. However, the claimants contended that there is no legal provision upon which to declare the suit as spent.

54. I agree with the respondents that the substantive remedy sought is permanent injunction to restrain them from holding a SNGC at Wild Waters, Mombasa on 27.9.2019 or any other date thereafter. The grounds upon which the said relief is sought is that the respondents were acting in breach of the union constitution by inviting the wrong officials to the SNGC and leaving out the correct members. It is common ground that the SNGC meeting took place, albeit in contempt of court. It is also common ground that the court vacated the temporary order on 20.1.2020 and thereafter the respondents held another SNGC meeting on 23.10.2020. Consequently, as the matters stand now, the suit as pleaded is spent and or overtaken by events.

55. In the end, save for the foregoing finding that the suit is spent, the rest of the orders sought by the Notice of Motion dated 2.3.2020 are declined and application is dismissed. Each party shall bear their own costs of the application and the suit which is now marked as spent and the file closed.

DATED AND DELIVERED IN NAIROBI THIS 29TH DAY OF APRIL, 2021.

ONESMUS N. MAKAU

JUDGE

In the presence of:

Mageto Advocate for the Petitioners.

Chimei Advocate for the Respondents.

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 ruling has been delivered to the parties online via Google Teams 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