



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NUMBER E419 OF 2020

BETWEEN

EDNA KALUNDE MUTINDA.....CLAIMANT

VERSUS

1. FRANCIS KALILA MWINZI

2. KENYA NATIONAL UNION OF TEACHERS [KNUT] MBOONI BRANCH

3. KENYA NATIONAL UNION OF TEACHERS.....RESPONDENTS

RULING

1. The Claimant filed an Application dated 21st August 2020, seeking orders, that: -

a. The Registrar of Trade Unions is restrained from registering the purported changes of the 2nd Respondent, made by the Secretary General of the 3rd Respondent, suspending the Branch Executive Secretary, the Claimant herein, and from replacing her with the Assistant Executive Secretary, Francis Kalila Mwinzi, pending hearing and determination of the Claim.

b. Francis Kalila Mwinzi is restrained from assuming or holding office, pending hearing and determination of the Claim.

c. The positions and status of officials of the 2nd Respondent and of Branch signatories to all bank account numbers 1206795913, 1206796286, and 1206796103 at Kenya Commercial Bank, Kikima Branch, and account number 01021670643000 at the Standard Chartered Bank Machakos Branch, be reverted to and maintained as they were prior to changes made by the 3rd Respondent's Secretary General, on or about 21st July 2020.

d. Declaration that the removal of the Claimant, and her replacement by Francis Kalila Mwinzi, is unlawful and the same be nullified and / or quashed.

e. Costs to the Claimant.

2. The Application is anchored on the Affidavit of the Claimant, sworn on 21st August 2020. She deposes that: she was elected Mbooni Branch Executive Secretary on 18th February 2016; she was employed as a full-time Branch Executive Secretary, on a monthly salary of Kshs. 198,837; the 3rd Respondent's Secretary General, Hon. Wilson Sossion, alleged to suspend her on 21st July 2020, on allegations of professional misconduct and indiscipline; Sossion then purported to replace the Claimant with Kalila; Article X-[C] [5] [L] and [D][5] and [6] of the 3rd Respondent's constitution, empowers the Branch Executive Committee [BEC] to suspend an officer and recommend suspension to the Branch- General meeting, which may either uphold or lift the suspension; the Claimant was not aware of any meeting, resolution or recommendation of the BEC with regard to her suspension; she was not served with any charges and was not heard; the 3rd Respondent's Secretary General did not have the capacity to suspend the Claimant; and the decision to suspend her, against this background, was null and void *ab initio*.

3. The Application is opposed through the Affidavits of Wilson Sossion, sworn on 28th August 2020 and on 16th September 2020 respectively.

4. Sossion deposes that: the Claimant alongside other Branch officials wrote a memorandum to Teachers Service Commission Chief Executive Officer, making serious allegations against Sossion; the memorandum was damaging to the 3rd Respondent and Sossion; it was against the 3rd Respondent's constitution; it was not sanctioned by the National Executive Committee [NEC], yet it related to national issues; NEC convened on 13th July 2020 and relying on Article 1X [7], which allows NEC to suspend or dismiss or replace any officers of the Union, resolved to remove and replace the Claimant; Sossion communicated NEC's decision to the Branch on 21st July 2020; the Branch itself wrote to the 3rd Respondent, addressing a separate issue of fraud and embezzlement of funds from the Branch by the Claimant; BEC held a meeting on 28th July 2020, and decided that the Claimant is suspended; and lastly, that the Claim and the Application are premature, as the internal disciplinary process is still on-going. In his Supplementary Affidavit, Sossion deposes that NEC resolved to proceed with the disciplinary cases of officials who were suspended but have not gone to Court.

5. Parties agreed to have the Application considered and determined through Written Submissions, which were confirmed to have been filed and exchanged, at the last mention on 4th February 2021. They mainly regurgitated the contents of their respective Affidavits as encapsulated above.

6. The Claimant relies largely on the decision of Hon. Justice Jorum Abuodha, in ***Eldoret E&LRC Cause No. 31 of 2020, Bonuves Kemei Tenai v. Wilson K. Kemboi & 3 Others***, where it was held: -

- Branch officials are elected by the Branches, in accordance with Article 10 [A] of the union's constitution. They have, as it were, their local constituents and supporters. Their removal by any other person, apart from their constituents, technically disenfranchises the constituencies they represent. This is the sense in which the BEC is empowered to take disciplinary action against any member or official at branch level. If dissatisfied with the action, such member or official has the right of appeal to the NEC.
- Where NEC purports to take first action against infractions by a Branch official or member, it severely constrains the right of such official or member to appeal such decision.
- Societies, Unions and Clubs are private organizations, bound by their own rules and regulations.

7. The Respondents reiterate that NEC is empowered to take necessary steps by 3rd Respondent's constitution, to ensure rules, regulations, standing orders and by-laws are followed to the letter. The steps include dissolution of the Branch, suspension of the Branch and suspension or expulsion of a Member of the Union. The Claimant wrote a damaging memorandum to the TSC CEO, in contravention of 3rd Respondent's constitution. The action taken against her is in accordance with the law, and the constitution of the 3rd Respondent. The Claimant has failed to establish a prima facie, as required in the frequently cited decision of ***Giella v. Cassman Brown and Co Ltd***. The Respondent has not provided the full citation, simply indicating this is a 1973 decision.

The Court Finds: -

8. It is common evidence of the Parties that the Claimant was the elected Branch Executive Secretary of the 3rd Respondent's Mbooni Branch.

9. She fell in trouble with the 3rd Respondent and in particular with its indefatigable Secretary General Wilson Sossion, following her participation in the drawing and communication of a memorandum addressed to the TSC CEO Dr. Nancy Macharia, which was highly critical to Wilson Sossion.

10. The memorandum alleged among other things, that Sossion embezzled teachers' strike funds to the tune of Kshs. 399 million; he failed to account for donor funds; he borrowed money from banks without the knowledge of members; he arbitrarily suspended members' meetings, rendering the 3rd Respondent functionless; he spent funds without the authority of the ADC; he hired and fired workers without regard to the Employment Act; he led the 3rd Respondent into signing CBA with TSC and later reneged on its implementation, personally instigating nationwide strikes, actions which culminated in double teacher payrolls; he presided over mass decline in 3rd Respondent's membership, leading to low income for the Branches, and inability to meet their financial obligations; and he created anarchy in the Ministry of Education.

11. The Court is of the view that these issues, gave as they were, could not be raised by a group of Branch Officials, directly with the Employer. They were national issues, properly under the jurisdiction of the National Office, pursuant to the constitution of the 3rd Respondent.

12. There are channels of communication and processing of grievances, between the National Office and the Branches. The issues ought to have been ventilated using the established industrial relations machineries.

13. The Branches do not engage the Employer directly. The Recognition Agreement, which is the foundation of industrial relations between the Union and the Employer, does not envisage a situation where Branches, or a group of Branch functionaries, arrogate themselves the power to engage the Employer, sidestepping the Union leadership at National Level.

14. The Claimant and her colleagues who congregated at Nyeri to traduce their Union and its Leaders, acted outside the confines of the constitution of their union, the Industrial Relations Charter, and the Labour Relations Act. They may have had very weighty grievances against Sossion, but sought redress outside the accepted industrial relations machineries.

15. While the Court agrees that the suspension of the involved Branch Officials ought to have originated from the BEC, on authority of ***Bonuves Kemei Tenai v. Wilson K. Kemboi & 3 others***, it is noted that the Claimant in addition to the role she played in the memorandum of Nyeri, was alleged to have been involved, around the same time, with embezzlement of funds at her Branch. The BEC met over this and

resolved to suspend her.

16. It would serve no purpose therefore, to stay the decision taken by NEC on the ground that it was irregularly taken, while there is a decision made regularly at the Branch, resulting in the same decision of suspension. The Claimant is properly on suspension on allegations of fraud and embezzlement. Should the Court order that she returns to office, because the NEC erred in suspending her directly from the Head Office? Should she continue to manage bank accounts while under fraud and embezzlement investigations?

17. The NEC can correct its error, by lifting suspension and directing the Branch to extend its actions against the Claimant, to her activities at Nyeri. Both accusations against the Claimant would then proceed to the NEC, in the manner envisaged by the constitution of the 3rd Respondent.

18. The Court is satisfied, based on the allegations of fraud and embezzlement of funds at the Mbooni Branch, that the Claimant was properly suspended following a recommendation of the BEC. There is no support for an order lifting suspension or stopping her replacement from discharging the role of Branch Executive Secretary.

19. It is noted also that the Registrar of Trade Unions is not a Party to this Claim. The Court cannot issue an order restraining a non-Party from taking the action the Claimant wishes the Registrar to be restrained from taking. Before an order is made against any Person, it is always a requirement of the law that such Person is heard.

IT IS ORDERED: -

a. The Application filed by the Claimant, dated 21st August 2020 is declined.

b. No order on the costs.

DATED, SIGNED AND RELEASED TO THE PARTIES, AT CHAKA, NYERI COUNTY, UNDER MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 27TH DAY OF MAY 2021

JAMES RIKA

JUDGE