



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO. 511 OF 2018**

**DOCK WORKERS UNION (K)..... CLAIMANT**

**VERSUS**

**MOHAMED SHERIA.....1<sup>ST</sup> RESPONDENT**

**JOSEPH SIALO MAKERO.....2<sup>ND</sup> RESPONDENT**

**MATREDA MATILDA MWAKIRETI.....3<sup>RD</sup> RESPONDENT**

**AND**

**BARCLAYS BANK OF KENYA LIMITED..... INTERESTED PARTY**

**JUDGMENT**

**Introduction**

1. The original dispute was instituted by the Claimant, by an amended Statement of Claim filed on 28<sup>th</sup> January 2019, in response to which the Respondents filed a Statement of Response and Counterclaim on 12<sup>th</sup> February 2019.
2. On 24<sup>th</sup> May 2019, the Claimant filed a Notice of Withdrawal of its claim against the Respondents.
3. While not objecting to the withdrawal of the Claimant's claim, the Respondents sought to pursue its counterclaim. In its ruling delivered on 20<sup>th</sup> February 2020, the Court determined that the Respondents' counterclaim had survived the withdrawal of the Claimant's claim, as a cross suit. The Claimant responded to the counterclaim by a Statement of Defence dated and filed in court on 28<sup>th</sup> February 2020.
4. The dispute in the counterclaim was canvassed by way of *viva voce* evidence, as well as written submissions. In its submissions, the Claimant made an attempt to resuscitate the question whether the Respondents' counterclaim could proceed after withdrawal of the Claimant's claim. The only thing I will say on this part of the submissions is that this Court, having rendered itself on the issue, in its ruling delivered on 20<sup>th</sup> February 2020, has no capacity to say more on that issue.
5. Mohamed Sheria, Joseph Sialo Makero, Gunda Kaneno and Ignatius Njeru Kanyamba testified for the Respondents. The Claimant called its General Secretary, Simon Kiprono Sang.

**The Counterclaim**

6. The Respondents state the nature of the dispute in the counterclaim as:

“Passing of an illegal, unlawful, ultra vires and void resolution by the National Executive Committee of the [Claimant] in contravention of Article 31(2) of the [Claimant's] Constitution.”

7. The Respondents plead that they were, at all material times, members and also National Chairperson, National Treasurer and Trustee, respectively, of the Dock Workers Union and that by virtue of the provisions of Article 41(2)(c) of the Constitution of Kenya, 2010 and Section 4(2)(a) and (c) of the Labour Relations Act, they each had a right to participate in the lawful activities of the Union and to serve as its

officials.

8. The Respondents further plead that on 18<sup>th</sup> May 2017, the Union National Executive Committee, under the leadership of the General Secretary, purported to pass various *ultra vires* decisions, some of which were quashed by the Court in **Mombasa ELRC Petition No. 11 of 2017: Mohamed Sheria, Joseph Makeero & Gunda Kaneno v Dock Workers Union & others**.

9. One of the aforesaid decisions was to disaffiliate from the Trade Unions Congress (TUC) by stopping the payment of affiliation fees and to re-affiliate with the Central Organisation of Trade Unions (COTU).

10. The Respondents' case is that the decision to disaffiliate from TUC by stopping the payment of affiliation fees and to re-affiliate with COTU was illegal, unlawful, completely void and *ultra vires*.

11. The Respondents maintain that the decision on affiliation is a preserve of the Conference under Article 31(2) of the Union Constitution and the National Executive Committee has no power or authority under Article 12 of the said Constitution to make any decisions on affiliation.

12. In their testimony before the Court, the Respondents stated that on 22<sup>nd</sup> October 2017, a Special Conference was held, where the Union illegally re-affiliated itself to COTU contrary to the Union Constitution.

13. The Respondents cite the following as particulars of illegality of the decision of the National Executive Committee (NEC) to disaffiliate from TUC and re-affiliate with COTU:

a. Under Article 12(2)(c)(i) of the Union Constitution, the NEC is supposed to implement the decisions of the Union made at the General Conference and the NEC therefore acted *ultra vires*, by purporting to reverse the decision of the Conference made on 18<sup>th</sup> October 2014;

b. The decision on affiliation is a preserve of the Conference under Article 31(2) of the Union Constitution and the NEC has no power or authority, under Article 12 of the said Constitution, to make any decision on affiliation;

c. No recommendation to leave TUC was actually passed by the NEC at the meeting of 18<sup>th</sup> May 2017 and no decision has ever been passed by the Conference held in accordance with the Union Constitution and the resolution to stop paying affiliation fees therefore has no legal foundation;

d. The clear purpose of the decision was to by-pass the Conference by getting the Union to disaffiliate from TUC by not paying affiliation fees;

e. The meeting of 18<sup>th</sup> May 2017 was not a properly constituted NEC meeting, within the text of Article 3 of the Union Constitution and all the resolutions passed thereat are null and void.

14. The Respondents' counterclaim is for a declaration that the decision of the Union NEC to dis-affiliate from TUC by stopping the payment of affiliation fees and to re-affiliate with COTU was illegal, unlawful, completely void and *ultra vires*.

15. In this regard, the Respondents seek the following remedies:

a. A declaration that the Claimant's National Executive Committee meeting held on 18<sup>th</sup> May 2017 was not constituted in accordance with the provisions of the Claimant's Constitution and consequently all resolutions passed were illegal, unlawful and void;

b. A declaration that the decision of the Claimant's NEC to dis-affiliate from the Trade Unions Congress by stopping the payment of affiliation fees and to re-affiliate with the Central Organization of Trade Unions was illegal, unlawful, completely void and *ultra vires* the powers of the NEC as provided in the Union Constitution;

c. A declaration that until a decision is passed by the Conference of the Claimant in accordance with Articles 9, 10, 11 and 31 of the Claimant's Constitution, the resolution of the Claimant's Conference passed on 18<sup>th</sup> October 2014 affiliating the Claimant to the Trade Unions Congress, and as upheld by the Court in **Mombasa Industrial Court Cause No. 532 of 2014: Geoffrey Mareko & 4 others v the Secretary General, Dock Workers Union & another**, remains valid and binding upon the Claimant and upon all its organs and officers with all attendant legal obligations that come with such affiliation;

d. Costs of the counterclaim.

### **The Claimant's Response**

16. In response to the Respondents' counterclaim, the Claimant filed a Statement of Defence on 28<sup>th</sup> February, 2020.

17. The Claimant states that the counterclaim, as pleaded, is *res judicata* since the facts and issues it raised were the subject of **Mombasa**

**ELRC Petition No. 11 of 2017: Mohammed Sheria & 2 others v Dock Workers Union(K) & 6 others.**

18. The Claimant further states that whereas its affiliation to other bodies is a matter which must be approved by the Conference, the process of initiating the affiliation is a preserve of its National Executive Committee, through the General Secretary, which circulates the agenda of the Conference.

19. Regarding *Mombasa ELRC Petition No. 11 of 2017: Mohammed Sheria & 2 others v Dock Workers Union(K) & 6 others*, the Claimant states that the issue under consideration was suspension of the 1<sup>st</sup> and 3<sup>rd</sup> Respondents, not the unconstitutionality of the Claimant's National Executive Committee meeting held on 18<sup>th</sup> May 2017.

20. On the issue of disaffiliation from TUC, the Claimant states that it is within the mandate of NEC to conduct the business of the Union in between Conferences and adds that the decision taken on 18<sup>th</sup> May 2017, was to suspend or defer payments to TUC, as an interim measure and the intention was not to change its affiliation to the Central Organization of Trade Unions.

21. The Claimant maintains that the NEC conducted its business, on 18<sup>th</sup> of May 2017, in accordance with the Union Constitution and procedures.

22. The Claimant goes on to state that the decision to re-affiliate with the Central Organization of Trade Unions was discussed and ratified at a Special Conference held on 22<sup>nd</sup> October 2017.

**Findings and Determination**

23. Having considered the parties' pleadings, testimony and submissions, the following issues emerge for determination in this counterclaim:

- a. Whether the subject of the counterclaim is *res judicata*;
- b. Whether the meetings held on 18<sup>th</sup> May 2017 and 22<sup>nd</sup> October 2017 were regular;
- c. Whether the decisions arising from the said meetings were lawful;
- d. Whether the Claimant remains affiliated to the Trade Unions Congress or to the Central Organization of Trade Unions.

**Res Judicata?**

24. The principle of *res judicata* is codified in Section 7 of the Civil Procedure Act which provides:

**7. Res Judicata**

**No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.**

25. The Court of Appeal restated this principle in *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others [2017] eKLR* in the following terms:

“Thus for the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

- a. The suit or issue was directly and substantially in issue in the *former suit*.
- b. The former suit was between the same parties or parties under whom they or any of them claim.
- c. Those parties were litigating under the same title.
- d. The issue was heard and finally determined in the former suit.
- e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue was raised.”

26. In its written submissions filed on 24<sup>th</sup> May 2021, the Claimant contends that by their counterclaim, the Respondents are challenging the NEC meeting held on 18<sup>th</sup> May 2017, which was the subject of *Petition No. 11 of 2017: Mohamed Sheria & 2 others v Dock Workers Union*, filed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, alongside one of the Respondents' witnesses, Gunda Kaneno.

27. By its own admission, the Claimant concedes that **Petition No. 11 of 2017**, which was heard and determined by my brother, **Rika J**, had to do with the processes and procedures leading to the suspension of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents by the NEC meetings held on 6<sup>th</sup> April 2017 and 18<sup>th</sup> May 2017. The Claimant goes on to state that the issue of notice of the said meetings, which forms part of the Respondents' complaint in their counterclaim, was not before the Court in **Petition No. 11 of 2017**. In its submissions therefore, the Claimant has killed its own argument that the subject of the counterclaim is *res judicata*.

### **Regularity of Meetings**

28. The Respondents submit that the meeting of the Claimant's National Executive Committee held on 18<sup>th</sup> May 2017, was not properly convened because the Chairperson was not consulted, as required by Article 12(3)(b) of the Union Constitution.

29. The 1<sup>st</sup> Respondent, Mohamed Sheria, who holds the position of Union Chairperson, told the Court that first, he was not made aware of the meeting of 18<sup>th</sup> May 2017 and second, that he did not attend the said meeting as he was travelling at the time.

30. In response to this particular complaint, the Claimant makes general statements to the effect that verbal consultations had taken place between the General Secretary and the Chairman. There was however no firm evidence to support this statement.

31. In light of the importance of the decisions taken at the said meeting, it was incumbent upon the Claimant to avail evidence to show that the Chairperson was involved in its convening, as required by Article 12(3)(b) of the Union Constitution. In the absence of any such evidence, the only conclusion to make is that the meeting of 18<sup>th</sup> May 2017 was not properly convened.

32. The Respondents further challenge the regularity of the Special Delegates Conference held on 22<sup>nd</sup> October 2017, on the ground that it was not convened in accordance with Article 11 of the Union Constitution. The said Article provides that a Special Delegates Conference can only be convened by a resolution of the National Executive Committee or a written request by members of the Union. The Claimant did not produce evidence of any of the aforesaid prerequisites having been met. Moreover, the Claimant's General Secretary, Simon Kiprono Sang was unable to show any notice convening the Special Delegates Conference.

33. As it stands therefore, the Special Delegates Conference held on 22<sup>nd</sup> October 2017, was also not properly convened.

### **Decisions Taken at the Meetings**

34. The twin decisions taken in the impugned meetings, which are the subject of these proceedings, had to do with the Claimant's disaffiliation from the Trade Unions Congress and re-affiliation with the Central Organisation of Trade Unions.

35. Apart from challenging the regularity of the said meetings, the Respondents take issue with the mandate assumed by the National Executive Committee to stop payment of affiliation fees to the Trade Unions Congress. While conceding that this decision had been taken at the meeting of the National Executive Committee of 18<sup>th</sup> May 2017, the Claimant pleads that this was an interim measure, pending ratification by the Special Delegates Conference.

36. There is everything wrong with this approach. First, by virtue of Article 31(2) of the Union Constitution, only the National Delegates Conference could make the decision on affiliation. Second, the decision taken to stop payment of affiliation fees to the Trade Unions Congress was a final decision and the alleged ratification by the Special Delegates Conference was a sham. Third, both the National Executive Committee meeting and the Special Delegates Conference, at which the matter of affiliation was discussed, were improperly convened and any decisions ensuing therefrom were unlawful and a nullity.

### **Status of the Claimant's Affiliation**

37. The Respondents submit that the Claimant remains a member of the Trade Unions Congress as the Claimant's members had participated in many activities facilitated by TUC, after the meetings of 18<sup>th</sup> May 2017 and 22<sup>nd</sup> October 2017.

38. The Respondents further submit that the Claimant had not given a six-month disaffiliation notice to the Trade Unions Congress as required by Article 11 of the TUC Constitution.

39. However, as was confirmed by the Executive Officer of TUC, Ignatius Njeru Kanyamba who testified as fourth witness for the Respondents, the Claimant had defaulted in payment of affiliation fees for more than three years.

40. According to Article 10 of the TUC Constitution, a member falling in arrears for more than 13 weeks loses its affiliations status. Kanyamba told the Court that the Claimant had been exempted from this provision but did not provide any documentary evidence to support his averment. As a result, the Court did not find anything to support a departure from a clear provision of the TUC Constitution.

41. Pursuant to the foregoing, I find and hold that:

a. Flowing from the finding that the decisions taken by the Claimant's National Executive Committee and Special Delegates Conference, regarding the Claimant's affiliation were unlawful, the Claimant's re-affiliation to the Central Organisation of Trade Unions is nullified;

b. Notwithstanding the finding that the decisions taken by the Claimant's National Executive Committee and Special Delegates

Conference, regarding the Claimant's affiliation were a nullity, the Claimant had, by reason of default in paying affiliation fees, lost its affiliation to the Trade Unions Congress.

c. Each party will bear their own costs in the counterclaim.

42. Orders accordingly.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 16<sup>TH</sup> DAY SEPTEMBER 2021**

**LINNET NDOLO**

**JUDGE**

**ORDER**

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Ochieng (Union Representative) for the Claimant

Miss Ongeso for the Respondents