



**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  
WAREHOUSES WORKERS UNION.....1<sup>ST</sup> RESPONDENT  
REGISTRAR OF TRADE UNIONS.....2<sup>ND</sup> RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 5<sup>th</sup> November, 2021)

**RULING**

The 1<sup>st</sup> respondent filed on 05 .04.2021 an application by way of the notice of motion dated 03.03.2021 and in person. The application was under sections 3 and 12 of the Employment and Labour Relations Court Act, section 41(1) and 47(2) and (a) and (b) of Labour Relations Act, 2007, rule 4(2) of ELRC (Procedure)Rules, 2016 and the inherent powers of the Court. The 1<sup>st</sup> respondent prays for striking out or dismissal of the claimant’s memorandum of claim (undated) filed in Court on 5<sup>th</sup> February 2020 with costs; and costs be provided for. The application is based on the annexed affidavit of James O. Tongi, the applicant’s General Secretary and upon the following grounds:

a) The claimants filed the memorandum of claim on 05.02.2020 together with a notice of motion. The Court delivered ruling on the motion on 29.01.2021.

b) In that ruling the Court found thus, “**The 1<sup>st</sup> issue for determination is whether the claimants are valid members of the 1<sup>st</sup> respondent and therefore not lacking standing to file the present suit as urged in the 1<sup>st</sup> respondent’s notice of preliminary objection dated 10.03.2020. Section 41 (1) of the Labour Relations Act, 2007 provides that the Court may grant an injunction restraining unauthorized or unlawful expenditure of the funds of a trade union on application by the Registrar or by five or more persons having a sufficient interest in the relief sought. The undisputed evidence is that the claimants are duly registered officials of the 1<sup>st</sup> respondent. Section 31 of the Act provides that officials of a trade union shall be persons who have been engaged or employed in the sector for which the trade union is registered. Section 35(5) of the Act provides that no change of officials shall have effect until it is registered by the Registrar. In view of those provisions and the undisputed evidence that the claimants are registered officials of the 1<sup>st</sup> respondent, the Court returns that they have established standing to file the present case and application because as registered officials of the 1<sup>st</sup> respondent they have sufficient interest in affairs of the 1<sup>st</sup> respondent. In any event, section 41(1) of the Act prescribes the applicants as five or more persons with sufficient interest and does not provide that such persons need to be members of the trade union. The notice of preliminary objection dated 10.03.2020 is therefore lacking in merits and is liable to dismissal.**”

c) The 1<sup>st</sup> respondent conducted its 2021 elections and the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 6<sup>th</sup> claimants lost their positions during the elections calendar event and therefore technically lost interest to pursue the matter.

d) Section 35 (5) of the Labour Relations act, 2007 provides that no person who is not registered by the Registrar in accordance with the section shall act or purport to act as an official of a trade union, employers' organisation, or federation of any branch.

e) The memorandum of claim has since been overtaken by events and it shall not realise any cause of action and it is unnecessary waste of judicial time.

f) The 4<sup>th</sup> and 5<sup>th</sup> claimants are the only remaining and they do not meet the statutory threshold required in section 41(1) of the Act to sustain the suit as filed. The claim lacks sufficient legs to stand and be sustained and the suit is hopelessly unsustainable.

g) The 1<sup>st</sup> respondent's members have since elected new officials to represent their interests. They should be allowed to serve peacefully without interruption through litigation.

h) The claimants are strangers who have no known sufficient interest as contemplated in section 41(1) of the Act.

The 1<sup>st</sup> claimant opposed the application by filing his replying affidavit on 17.05.2021 and further affidavit on 13.07.2021 through Khaminwa and Khaminwa Advocates. He urged as follows:

a) The application is a nonstarter calculated to frustrate the claimants' suit against the 1<sup>st</sup> respondent.

b) The suit is pending determination. The application is an abuse of court process because the issues raised had been determined in the Court's ruling delivered on 12.03.2021. The suit is not about elections that were held as relied upon in the application but, is about the 1<sup>st</sup> respondent's financial management and use of funds.

c) The application is aimed at delaying the expeditious hearing of the suit.

d) The application should be dismissed to pave way for hearing of the suit. There are no established reasons to strike out the suit.

e) The further affidavit states that the 2<sup>nd</sup> respondent has failed to issue the correct extract of the newly elected officials of the 1<sup>st</sup> respondent's for Changamwe Branch per elections held on 08.06.2021.

The claimants and 2<sup>nd</sup> respondent did not file submissions and the applicant, the 1<sup>st</sup> respondent filed the submissions. The Court has considered all the material on record and returns as follows.

**First**, in the ruling delivered on 29.01.2021 and with reference to section 41(1) of the Labour Relations Act, 2007, the Court held, “**In any event, section 41(1) of the Act prescribes the applicants as five or more persons with sufficient interest and does not provide that such persons need to be members of the trade union. The notice of preliminary objection dated 10.03.2020 is therefore lacking in merits and is liable to dismissal.**” The Court finds that by that holding, the applicant was misconceived in considering that if all or any of the claimants had ceased to be an official of the 1<sup>st</sup> respondent, then the suit was lacking in “legs to stand on”. The Court finds that in any event whether the claimants have sufficient interest or not would be an issue for trial to be resolved after evaluating the evidence and the parties' respective submissions. That ground as urged for the applicant towards striking out or dismissing the suit is found misconceived and unjustified.

**Second**, as urged for the claimants, the issue of the cause of action in the suit was determined in the ruling delivered in the suit on 12.03.2021 and it was misconceived for the applicant to urge that the suit be struck out or dismissed on account of the elections and new officials whereas the Court already found that the suit was about the 1<sup>st</sup> respondent's financial management and use of funds. The Court in the ruling delivered on 12.03.2021 found thus, “**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.**”

Similarly, the Court returns that it was an abuse of court process for the applicant in the present application to urge the suit be dismissed as it had been overtaken by events, namely elections and new officials in place, while the Court had already found that the issue of elections and the new officials was outside the cause of action in the present suit.

**Third**, the Court finds that as urged for the claimants, the applicant has failed to established any of the well-known grounds for striking out a suit.

In conclusion the application is hereby dismissed with orders:

1) The applicant to pay the claimants' costs of the application.

2) Parties to take appropriate steps towards the expeditious hearing and determination of the main suit.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 5TH NOVEMBER, 2021.**

**BYRAM ONGAYA**

**JUDGE**