



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 46 OF 2019

(Before Hon. Justice Mathews N. Nduma)

JOSHUA O. OGALO.....CLAIMANT

VERSUS

KENYA NATIONAL UNION OF TEACHERS (KNUT).....1ST RESPONDENT

KENYA NATIONAL UNION OF TEACHERS

KISUMU EAST BRANCH.....2ND RESPONDENT

RULING

1. The application dated 21st May 2019 was filed on even date seeking to stop implementation of a retirement notice dated 28th January 2019 in terms of which the Claimant/Applicant was to retire from employment effective 30th June 2019.

2. The basis of the action is that the intended termination is being effected with blatant disregard of the rules of substantive and procedural fairness. That the claimant is employed as the Executive Secretary, Kisumu East Branch of the Respondent on a five (5) year term in terms of elections conducted in 2016. That decision is discriminatory since holders of Elective positions of the respondent have served beyond 60 years age. That the Applicant is not facing any disciplinary issues and the intended termination is unlawful and unfair.

3. The respondent filed a replying affidavit of Wilson Sossion, the Secretary General of the 1st respondent. He states that the applicant was elected on 6th March 2016. That the election of the applicant is guided by the union constitution. That the constitution provides that all elected officials shall serve for a certain period of time provided that the elected official is to retire upon attainment of sixty (60) years.

4. That the Applicant's term of employment was not for a fixed term of five years as alleged or at all. That Article XVII (E) of the KNUT constitution provides:

“Any union official shall cease to hold office upon attaining the age of sixty (60) years, upon resigning by notice in writing to the National Executive Council (NEC) or Branch Executive Committee (BEC) or is removed by vote at an Annual Delegates Conference (ADC) or Special conference”

5. That the election for a five year term and issuance of letter to that effect is subject to the termination clause in the constitution.

6. That the notice of retirement was lawful, proper and procedural and that the application be dismissed.

Determination

7. For the applicant to be granted interlocutory conservatory orders pending the hearing and determination of the suit, he has to satisfy the prerequisites set out in the case of ***Giella vs Cassman Brown Limited*** to wit:

(i) That he has made out a *prima facie* case.

(ii) That he will suffer damages not capable of being remedied by damages in the event the suit is successful.

(iii) That the balance of convenience favours the grant of the interim relief.

8. The applicant relies on the case of *Michael Babwova Bahola vs Kenya National Union of Teachers and 3 others (2019) eKLR* in which the court found that the conditions set out in the case of Giella vs Cassman Brown Limited had been satisfied.

9. In the present case the court is satisfied that the Applicant was re-elected to the position of Branch Secretary on 11th February 2016 on a five year term that was due to end on 10th February 2021.

10. The Applicant has however attained the sixty (60) years retirement age and was served a retirement notice to take effect on 30th June 2019.

11. The court has carefully considered the provision of Article XVII (E) of the KNUT constitution (supra) and is satisfied that a union official “*shall cease to hold office upon attaining the age of sixty (60) years*” notwithstanding the expiry date of the term of office of the particular union official, elected or otherwise.

12. Accordingly, the Applicant has failed to establish a prima facie case to warrant grant of a conservatory order.

13. The Application lacks merit and is dismissed with costs to the Applicant.

Ruling Dated, Signed and delivered this 5th day of March , 2020

Mathews N. Nduma

Judge

Appearances

Rakoro for Applicant.

Mr. Sigai for the Respondent

Chrispo – Court Clerk