



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 980 OF 2012

(Before Hon. Lady Justice Maureen Onyango)

PETER MWAURA KAMAU.....CLAIMANT

VERSUS

KENYA UNION OF POST PRIMARY EDUCATION TEACHERS (KUPPET)....1ST RESPONDENT

SECRETARY GENERAL, KUPPET.....2ND RESPONDENT

NATIONAL CHAIRMAN, KUPPET.....3RD RESPONDENT

NATIONAL TREASURER, KUPPET.....4TH RESPONDENT

THE REGISTRAR OF TRADE UNIONS.....5TH RESPONDENT

AND

TEACHERS SERVICE COMMISSION.....INTERESTED PARTY

JUDGMENT

The Claimant was the Branch Executive Secretary of the 1st Respondent’s Kiambu Branch at the time of filing this claim. The 1st Respondent is a trade union registered under the Labour Relations Act to represent the interests of teachers employed by Teachers Service Commission (TSC), the Interested Party, in post primary learning institutions. The 2nd, 3rd and 4th Respondents are officials of the 1st Respondent and the principal signatories of the union account while the 5th Respondent is the Registrar of Trade Unions. The Interested Party is a constitutional commission created under Article 248 of the Constitution of Kenya.

The Claimant instituted this claim in 2012 but amended the same vide the Amended Claim dated 9th June 2015 and further amended the claim on 2nd October 2018. The Claim before this Court is the latter where the following reliefs have been sought–

- a. That this Court be pleased to issue orders compelling the 1st to 4th respondents to release the Claimant salaries and allowances for the period of June 2011 to June 2018 unlawfully withheld and amounting to Kshs.51,054,533.00 together with accrued interest with effect from 1st June 2011 until payment is made in full.
- . That in the alternative and without prejudice to the above, this Court do issue orders compelling the 1st to 4th Respondents to release to the Claimant salaries and allowances for the period of June 2011 to June 2018 unlawfully withheld and amounting to Kshs.27,747,783.00 together with accrued interest with effect of 1st June 2011 until payment is made in full.
- c. That this Court be pleased to issue orders directing the 1st to 4th Respondents to be paying salaries and allowances to the Claimant at the end of every month when such payments are due and at the rate of Kshs.559,137.00 per month with effect from 1st July 2018 into his designated Equity Bank Account Number 0640192873117 Kiambu Branch.
- d. That the Court do make a declaration that the 4th Respondent grossly violated the Claimant’s rights and fundamental freedoms pursuant to section 4 of the Labour Relations Act 2007, the registered constitution of KUPPET and Articles 28, 36 and 41 of the

Constitution of Kenya 2010 and order the 4th Respondent to pay general damages to the Claimant.

e. THAT the Court be pleased to make a declaration that the changes made by the 5th Respondent in the register of Kiambu County Branch on 19th January 2013 and communicated vide the purported illegal extract dated 22nd January 2013 is unlawful and consequently compel the 5th Respondent to revoke the said extract and any other extract(s) purporting to register new officials and thereafter reinstate back to the register the *bonafide* officials as per the consent award entered in the Industrial Court Cause No. 1325 of 2011 dated 26th January 2012 until Kiambu County Branch holds a properly convened Branch General Assembly to elect new officials.

f. That the Court be pleased to order the 1st to 4th Respondents to pay the Claimant compensation at an amount (Kshs.982,000.00) equal to defray accrued loan interest occasioned by the withholding Claimant's salaries and allowances and any other subsequent penalties at the rate of Kshs.20,965.00 with effect from 30th June 2018 until the time of delivery of judgment.

g. That the Claimant be awarded costs payable by the 1st to 4th Respondents and any other relief as this Court deems fit, just and expedient in the circumstances to meet the ends of justice.

The Respondents filed their defence to the Statement on Claim of 19th June 2012 and the Reply dated 24th October 2018 in response to the Amended Statement of Claim.

The Claimant's Case

The Claimant avers that he was elected as the Branch Executive Secretary of the 1st Respondent's Kiambu County Branch on 5th February 2011, registered by the 5th Respondent as such and appointed by the 1st Respondent to work as a full-time employee effective 1st June 2011 for a period of 5 years until February 2016 with an option of being released back to the Interested Party if his employment was terminated on account of not being re-elected.

Consequently, he was released from the payroll of the Interested

Party and all obligations pertinent to his employment became that of the 1st Respondent on the condition that the Interested Party would receive a written notice one month prior to the Claimant ceasing to be an official so that he could be posted to a public school before the break of his service occurred.

The Claimant avers that vide the 1st Respondent's Circular KUP/BR/CIR/011 of 22nd March 2011, it was communicated that 30% of the Branch's funds were meant to pay the Branch Executive Secretary. The Claimant further avers that the 1st Respondent failed to remit the Claimant's pension to the Interested Party for onward transmission to the Director of pensions.

Consequently, the 1st Respondent owes the Claimant a salary of Kshs.46,903,479.00 tabulated as [Basic salary (508,307) + Allowances (50,830) = 559,137 x 84 months] and pension of 3,758,454.00 accruing from June 2011 to June 2018.

In the alternative, it is averred that pursuant to the formula provided for in the Circular for Payment of Executive Salaries Allowances and Branch Expenditure Guidelines of 8th September 2011, an executive secretary was to earn a salary of Kshs.182,532.00 (Kshs.84,500 + 52 [X - 700]) where X was the actual number of members. As such, the Claimant was entitled to a salary of Kshs.281,675.70 as at March 2012. The Claimant avers that he only received part payment for his June salary of Kshs.64,029.00 and had not received any salary and allowances at the time of filing the amended claim hence is entitled to a salary of Kshs.23,596,729.00 and a pension of Kshs.3,758,454.00 accruing from June 2011 to June 2018.

The Claimant avers that he lent the branch Kshs.392,600.00 during the period of July 2011 to December 2011, which the 1st Respondent undertook to pay but is yet to refund. The Claimant further avers that the 1st to 4th Respondents' failure to pay his salaries caused him to default on his loan which has accrued compounded interests and default penalties amounting to Kshs.982,000.00 and thereby causing him to be listed with CRB.

The Claimant avers that the 1st Respondent and Kiambu County Branch entered into an agreement dated 14th February 2012 on the implementation of the consent orders in Industrial Cause No. 1325 of 2011 where it was agreed that the Claimant would be remunerated from the 1st Respondent's national office from January 2012 and that the 1st respondent would pay to him Kshs.392,000.00 which he had incurred while running the office. However, the 4th Respondent disregarded the agreement and paid the Claimant Kshs.300,000.00 in January 2012 instead of the agreed Kshs.1,100,000.00, reduced his February salary to Kshs.160,000.00 and paid the Claimant Kshs.64,029.00 as part payment of his March salary.

The Claimant avers that the 5th Respondent altered the register of Kiambu County Branch and irregularly registered the 4th Respondent as the Executive Branch Secretary. However, the Claimant continued to serve as the Executive Secretary even after the year 2016 as the Branch failed to conduct elections.

During trial, the Claimant testified as CW1 and basically reiterated the facts set out in his pleadings as outlined above.

Upon cross examination, it was his testimony that the elections of 5th February 2011 were conducted despite being called off while another election was conducted on 26th March 2011. He maintained that he was elected on 5th February 2011 but evidence that his name did not

appear in the extract of officials elected after the elections of 19th January 2013. It was also his concession that he did not participate in the elections of 2016.

He conceded that the ruling delivered on 13th November 2012 in Cause No. 1325 of 2011 ordered that there be fresh election within 6 months and orders regarding status quo were discharged. He further conceded that the ruling delivered on 30th April 2013 in Cause No. 1325 of 2011 observed that elections had been held on 19th January 2013.

The Claimant conceded to the fact that there was a letter from the Interested Party posting him to Tinganga Secondary School but contended that he never reported to work because he never received the letter. He stated that his amended claim did not show the membership list from June 2011.

It was the Claimant's concession that there was no by-product on his dues computation from June 2011 to date. He stated that the branch dues depended on the number of members. It was his testimony that he used the computation ordered by Court.

On re-examination, it was also his testimony that the labour office was involved in the elections and that the 5th Respondent confirmed the elected officials vide a forwarding letter together with the registration certificate of the branch. He denied receiving the letter of 1st February 2011 which cancelled the elections, extracts of the officials who had been elected in the elections held on 26th March 2011 or the existence of a Form Q for the said elections.

It was his testimony that the order for leave granted in **Judicial Review Application No. 168 of 2011** was to operate as a stay of the decision of the Registrar in the letters dated 24th March 2011 and 14th July 2011. It was his position that the prayers sought in **Cause No. 314 of 2011** and in the Memorandum of Claim in **Cause No. 1325 of 2011** were not granted.

The Claimant stated that he challenged the 5th Respondent's letter of 1st August 2011 directing the National Executive Board to organize elections of Kiambu Branch within the next 30 days, in **Cause No. 168 of 2011** and it was declared to be in contravention of the Court's orders, void and was suspended and the elections called were nullified.

It was his testimony that consent recorded resolved all existing issues. The consent was adopted as the Court's award, which has never been reviewed, set aside or appealed against.

The Claimant maintained that the by-product he based his calculations on was supplied by the Interested Party after a Court order was issued for it to supply the same.

The Claimant contended that at the time the Interested Party sent the letter posting him to Tinganga Secondary School effective 13th March 2013, his services as a Branch Secretary had not been terminated neither did the 1st to 4th Respondents write to the Interested Party seeking to have his employment terminated. It was his position that if he had failed to report to his posting in Tinganga, he would have been interdicted and called for a disciplinary hearing. He denied being dismissed from employment by the Interested Party.

It was his testimony that no branch elections were held in 2016 and that he still occupied the office of the Branch Executive Secretary.

The Respondents' Case

The Respondents contend that the Claimant became a Branch Executive Secretary pursuant to the consent filed in Cause No. 1325 of 2011 and not through an election hence was not an official of the Branch. The Respondents aver that following the consent, the Claimant was paid Kshs.392,600 as his salary and allowances. The Respondents contend that it is not the 1st Respondent's responsibility to pay individual branch officials save for when it is directed to do so by the concerned branch as was in the Claimant's case for his February 2012 salary.

The Respondents further contend that the list of Kiambu Branch officials as outlined in the Statement of Claim is fabricated and that the formula adopted by the Claimant to calculate his salary is unfounded and based on invalid documents.

The 4th Respondent testified on behalf of the Respondents as RW1. He adopted his witness statement filed on 13th July 2016 and the documents annexed thereto. It was his position that the Claimant was the 1st Respondent's former Executive Secretary of Kiambu County Branch.

It was his testimony that Branch elections were held in March 2016, as directed by the 5th Respondent. He also testified that on 26th February 2012, the Claimant received Kshs.392,600.00 on account of any claim arising before the consent was signed.

It was his testimony that in March 2012, the Claimant's salary was recommended to be Kshs.70,000.00 each month. It was also his testimony that vide the letter dated 2nd April 2012, the branch recommended payment by check-off where the Head Office was to deduct salaries from money meant for the branch with effect from 2012. It was his position that it was the Branch's responsibility to pay the salaries of its staff by dint of article 8.8 of the 1st Respondent's Constitution. He stated that the Claimant was paid his salary for the month of March 2012.

It was his testimony that the Branch Governing Council suspended the Claimant together with 2 other branch officials, on 27th March 2012 over issues of fraud and the minutes sent to the Head Office. Mr. James Kimani was confirmed as acting Branch Executive Secretary. He testified that the Claimant was never reinstated as he never challenged the suspension and has not served the Kiambu County Branch since his termination. It was his position that fresh elections were ordered by dint of the orders issued on 30th April 2013.

Upon cross examination, he admitted that consent had been entered but contended that there had been no elections since they had been nullified by the 5th Respondent. He conceded that the Claimant was issued with Form F but was later nullified by the 5th Respondent. It was his testimony that he participated in the elections of 26th March 2013 and was elected the Branch Executive Secretary.

It was his position that the Constitution did not bar him from vying for positions both at the national and branch level. He conceded that any claim about the previous election was settled by the consent. It was his testimony that the employment letter was cancelled because of the cases pending in Court.

It was his testimony that the Claimant was posted to Tinganga in March 2013 and during this period the Court did not recognize him as an official as TSC had already deployed him. The 4th Respondent conceded that **Judicial Review Application No. 168 of 2011** nullified the 5th Respondent's letter of 1st August 2011 that deregistered officials and called for fresh elections. However, he contended that the consent order also set aside the orders in the JR Application.

It was the 4th Respondent's evidence that they had proof that the Claimant was paid salaries for February and March 2012. It was his testimony that all pending payments of more than Kshs.300,000.00 and pension scheme contributions were paid through a consent by an order of court, which was signed by the Claimant. He conceded that by signing the Agreement, he presumed the Claimant had been paid. He contended that the Claimant was not issued with vouchers as he was not an employee of the 1st Respondent.

He stated that branch elections of 19th January 2013 were conducted following an order of court and that the elections of 2016 were only for Kiambu.

It was also his testimony that the Claimant was present as the secretary in the meeting of 27th March 2012 which suspended him. However, he conceded that the Claimant's name was not in the minutes. He also conceded that he did not have proof that the NGC informed the Interested Party of the Claimant's suspension and stated that they were only informed when the Claimant was removed in March 2013.

It was his testimony that at the time he was voted as a Branch Executive Secretary, he was not a teacher at the TSC.

Upon re-examination, it was his testimony that one could hold an office for only 5 years before the elections are held. It was his testimony that elections in 2016 were held for all branches as well as the national office. He clarified that once a party was suspended, the national office could only conduct investigations and ratify the suspension. He maintained that no one had challenged his election as Branch Executive Secretary. It was his position that the Claimant had not been in the extract since 19th November 2013. Further, the Claimant was deployed back to work.

The Claimant's Submissions

The Claimant submits that the doctrine of estoppel, as outlined under section 140 of the Evidence Act, prevents the 1st Respondent from denying that it employed the Claimant on 1st June 2011 to serve a 5-year renewable term as the Branch Executive Secretary. The Claimant relies on the case of **Seascapes Limited v Development Finance Company of Kenya Limited (2009) eKLR** and **Serah Njeri Mwobi v John Kimani Njoroge (2013) eKLR** to support her position.

It is his submission that he has never received a termination letter hence is still employed by the 1st Respondent. On the posting letter of 13th March 2013 by the Interested Party, the Claimant submits that the 1st Respondent never adduced evidence to show that communication had been made to the Interested Party that he had been suspended or his employment terminated. It was his position that the letter had not been authored by the Interested Party because it advised the 1st Respondent to pay his pension contributions. Further, the Interested Party being a party to this suit did not inform this Court that the Claimant's employment had been terminated.

It is the Claimant's submissions that he had the legitimate expectation that he was duly elected and registered Branch Executive Secretary on account of the Respondent's actions and the occurrences after the elections of 5th February 2011 as well as the confirmation from extracts that he was the Executive Branch Secretary. As such, he had the right to hold the said position.

It is the Claimant's submissions that the Respondents did not adduce any evidence controverting circular KPT/BR/CIR/04/011 which indicated that the salaries for full time secretaries would be 30% of all dues from members of the branch. It is also submitted that the Respondents failed to prove that they had complied with Section 17(1)(b) of the Employment Act which requires an employer to pay an employee's wages as per the contract of service.

It was his position that the 4th Respondent did not tender any evidence to prove that he had remitted the Branch's monthly dues since 1st June 2011 to date. It was also his position that the 4th Respondent's testimony that it was his duty to pay the Claimant his monthly dues was an admission that the Claimant was never remunerated during the subsistence of his employment.

As regards the sum of Kshs.392,600.00 owed to him, the Claimant submitted that though an agreement had been executed for payment of the same, the same was never paid and the Respondents did not adduce any evidence to prove payment of the same.

It is the Claimant's submissions that his alleged suspension was contrary to the principles of natural justice, article 21 (g) of the 1st Respondent's Constitution and article 50 of the Constitution 2010. Further, the alleged suspension was contrary to the award in Cause No. 1325 of 2011, which has never been set aside. It is his position that a consent order has a binding effect and in the absence of evidence that it was obtained by fraud or collusion, the parties were bound by the same.

It is submitted that the Respondents did not adduce evidence to show that the elections of 19th January 2013 complied with sections 34 and 35 of the Labour Relations Act and the 1st Respondent's Constitution hence no valid election or by-election occurred. As such, the 5th Respondent had no legal basis to interfere with the register of officials hence the interference should be declared null and void. It is the Claimant's position that the 5th Respondent is party to these proceedings yet did not adduce evidence or file pleadings to give a justification for the interference.

The Respondents' Submissions

The Respondents submit that elections were conducted on 19th January 2013, pursuant to Wasilwa J.'s ruling delivered on 13th November 2012 directing parties to hold elections within 6 months if they failed to agree on the leadership of the Branch.

It is their position that the Ruling issued by this court nullified the previous elections, which decision was not appealed by the Claimant. It is their position that the Claimant's legitimate expectation to be treated as an employee could not override the said orders, as court orders must be obeyed.

It is further submitted that payment of salary to the Claimant at 30% of all the dues payable was discretionary, by dint of article 17 (g) of the 1st Respondent's Constitution. Further, that the Claimant ceased to be an employee after the invalidation of the elections of 5th February 2011 as was held in the ruling delivered by Madzayo J. (as he then was), in Cause No. 1325 of 2011. It is submitted that the Claimant was duly paid Kshs.392,600.00 before his election was invalidated.

Finally, the Respondents submit that due process was followed in the termination of the Claimant's employment and that the Claimant had the right to appeal the order but failed to do so.

Determination

I have carefully considered the pleadings, the evidence adduced and parties' written submissions and find that the issues for determination before this Court are –

- a. Whether the Claimant was the Branch Executive Secretary of the 1st Respondent's Kiambu County Branch.
- b. Whether the Claimant's employment was lawfully terminated.
- c. Whether the Claimant is entitled to the reliefs sought.

Whether the Claimant was the Branch Executive Secretary

It is not in contention that there were two parallel elections of the 1st Respondent's Kiambu County Branch, one held on 5th February 2011 and the other held on 26th March 2011. The two elections and the results arising therefrom led to wrangles that saw the officials challenge the validity of the respective elections in Court.

However, a consent agreement dated 25th January 2012 was filed in Court and adopted as an award in Cause No. 1325 of 2011. The terms of the consent agreement were that the 5th Respondent was to register new officials of the 1st Respondent's Kiambu County Branch, amongst them the Claimant. This position is reflected in the extract from the 5th respondent as at 27th January 2012 (page 73 of the bundle of documents annexed to the Claimant's Supplementary Affidavit) which showed that the Claimant was indeed the Secretary of Kiambu Branch of the 1st respondent.

It would seem that the 1st Respondent conducted elections pursuant to the Ruling of Wasilwa J. delivered on 13th November 2012 which directed the parties to conduct fresh elections within 6 months if the parties failed to agree on leadership.

On 1st October 2011, the Claimant received a letter from the 1st Respondent informing him that following his election as the Executive Secretary of Kiambu County Branch, he was employed on a full-time basis effective 1st June 2011. The terms of the employment were that the 1st Respondent was to release the Claimant back to the Interested Party if he ceased being an official or failed to be re-elected. The 4th Respondent testified that the elections of 19th January 2013 were registered and he informed this Court that the Claimant had not been elected in those elections. No evidence was adduced to show that these elections were challenged and either nullified or set aside.

Further, this Court in Cause No. 1325 of 2011 in the Ruling delivered on 30th April 2013 (page 118 to 122 of the Claimant documents annexed to the Claimant's Reply to the Defence), observed that there had been elections on 19th January 2013.

In light of the foregoing, I find that the Claimant ceased to be a Branch Executive Secretary after failing to be elected on 19th January 2013. It therefore follows that his employment on a full-time basis as an Executive Branch Secretary also ceased and there is on record a letter from the Interested Party posting the Claimant to Tinganga Secondary School whose authenticity has not been challenged.

Whether the Claimant's employment was lawfully terminated

As earlier observed, the Claimant's employment ceased after the elections of 19th January 2013 were conducted and he failed to be re-

elected. Further, he was required to report to his station in Tinganga Secondary School by dint of the letter of 12th March 2013, where he had been posted after failing to be re-elected and in accordance the terms of his employment letter of 1st October 2011. The letter was issued just shy of 2 months after the elections were held, implying that the 1st Respondent had issued the Interested Party with the requisite notice. It is therefore my finding that the termination of his employment as a full-time Branch Executive Secretary was in accordance with the terms of his letter of employment hence lawful.

Reliefs

The Claimant sought orders compelling the 1st to 4th Respondents to release his salaries and allowances for the period of June 2011 to June 2018 unlawfully withheld and amounting to Kshs.51,054,533.00 together with accrued interest with effect from 1st June 2011 until payment is made in full. In the alternative, the 1st to 4th Respondents to release to the Claimant salaries and allowances for the period of June 2011 to June 2018 unlawfully withheld and amounting to Kshs.27,747,783.00 together with accrued interest with effect of 1st June 2011 until payment is made in full.

The formula used by the Claimant in his alternative prayer was the latest communication from the 1st Respondent to the Branches regarding payment of allowances to full-time executive secretaries vide its circular KPT/EX/SEC/ALL/011 of 8th September 2011 following the National Governing Council Meeting held on 26th August 2011. Further, the Respondents have not refuted or controverted the Claimant's evidence that it had more than 700 members hence the Claimant's alternative prayer is granted but only from 1st June 2011 to 13th March 2013 which was the date that his posting to Tinganga Secondary School took effect. This is calculated using the formula $[Kshs.84,500 + 52(X - 700)]$ where X is the number of branch members.

However, I note that the list of the Branch members from the Interested Party as annexed by the Claimant (at page 83 and 84 of the documents annexed to the Amended Claim) is from May 2011 to January 2012. Since it is not possible to tabulate the Claimant's entitlement up to 13th March 2013 without the lists, the Interested Party is directed to issue to the claimant and 1st respondent and to file a copy of an updated list of the 1st respondent's Kiambu Branch members from May 2011 to April 2013 within 30 days for computation of the Claimant's dues.

Bearing in mind the history behind this matter, and the 1st Respondent's conduct in the past, this Court directs that the judgment amount be paid into the Claimant's Equity Bank Account Number 0640192873117 Kiambu Branch upon the same being ascertained.

This Court declines to direct the 1st to 4th Respondents to be paying salaries and allowances to the Claimant at the end of every month when such payments are due and at the rate of Kshs.559,137.00 per month with effect from 1st July 2018 into his designated Equity Bank Account Number 0640192873117 Kiambu Branch, having found that his employment was terminated pursuant to the elections held on 19th January 2013 and his posting letter of 12th March 2013.

The Claimant's prayer to have the changes made by the 5th Respondent in the register of Kiambu County Branch on 19th January 2013 and communicated vide the extract dated 22nd January 2013 declared unlawful and the 5th Respondent directed to revoke them, fails having been overtaken by events. It is common ground that elected officials serve for 5 years hence the said officials served until 2016. As such, granting such an order will be futile.

This Court declines to grant the order directing the 1st to 4th Respondents to pay the Claimant compensation at an amount (Kshs.982,000.00) equal to defray accrued loan interest occasioned by the withholding Claimant's salaries and allowances and any other subsequent penalties at the rate of Kshs.20,965.00 with effect from 30th June 2018 until the time of delivery of judgment. This being the Claimant's contractual responsibility arising under his loan agreement.

The 1st to 4th respondents will bear the claimant's costs of this suit.

Interest shall accrue at court rates from 13th March 2013 when the claimant ceased being an employee of the 1st respondent to date of payment in full.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 24TH DAY OF JULY 2020

MAUREEN ONYANGO

JUDGE

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 March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court. In permitting this course, the court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on the court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE