



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**T KISUMU**

**CAUSE NO. 15 OF 2016**

**STEPHEN ODHIAMBO OWUOR.....1ST CLAIMANT**

**HEZEKIAH ORENDE.....2ND CLAIMANT**

**LUCAS OLOO.....3RD CLAIMANT**

**VERSUS**

**VINCENT OCHIENG OKULLO.....1ST RESPONDENT**

**JOHN ATEMA..... 2ND RESPONDENT**

**JAMES NYAKEGO KINGOINA.....3RD RESPONDENT**

**THE REGISTRAR OF TRADE UNION.....4TH RESPONDENT**

**JUDGMENT**

1. The Claimants are members of Kenya Electrical Trade and Allied Workers union (**KETAWU**), Western Kenya Branch. The 1st to 4<sup>th</sup> Respondents are the Principal officials of the said Union, Western Kenya Branch.
2. The Cause of action herein arose from Union elections called by the 4<sup>th</sup> respondent, Registrar of Trade Unions on 25<sup>th</sup> November, 2015.
3. The National Executive Board (NEB) of the union held a meeting on 11/12/2015 and sanctioned the Branch General meeting of members for 9/1/2016. A notice was sent out to that effect on 30/12/2015, whose Agenda was Branch elections.
4. The 1st Claimant applied on or about 16/12/2015 for the position of Branch Secretary and was duly nominated, proposed and seconded on 22/12/2015. The 2nd and 3rd Claimants similarly applied for various posts and were nominated, proposed and seconded.
5. It is the Claimants' case that the Branch Elections held on 9/1/2016 were a sham and in violation of the Union Constitution especially on the issue of eligibility of the incumbent branch secretary to contest for the said position and on the election of the Committee members and delegates.
6. The Claimants prays for:-
  - a. A declaration that the purported Branch General Meeting of members of the Kenya Electrical, Trade & Allied Workers Union (KETAWU) Western Kenya Branch held on 9/1/2016 was unlawful and the elections purportedly conducted thereon were sham elections, were unlawful and were against the Union Constitution and thus null and void *ab initio* and the same be nullified and or quashed.
  - b. A declaration that the decision of change of officials of the Union made on or about 12/1/2016 by the Registrar of Trade Unions and any extract of officials of the Union issued subsequently is unlawful and the same be nullified and or quashed.
  - c. A mandatory injunction restraining the Registrar of Trade Unions from registering the purported change of officials of (KETAWU) Western Kenya Branch made on or about 9/1/2016.

d. A mandatory injunction restraining the officials listed in the Form Q dated on or about 11/1/2016 from assuming and or holding office and discharging their duties and functions as officials of the said Union.

e. An Order directing that National Elections of the Union be held afresh as per the Unions Constitution and the law.

f. Costs of the suit.

### **Defence**

7. The 1st, 2nd and 3rd Respondents filed a statement of defence on 4<sup>th</sup> February, 2016 in which they admit all particulars of the elections held on 9/1/2016 as per the notice dated 30/12/2015. The Respondents admit the 1<sup>st</sup> claimant applied for the position of Branch Secretary and was duly nominated, proposed and seconded as per Article 5.8.2 of the Union Constitution and was issued with a Certificate of Clearance to vie for that position.

8. The Respondents admit that the National Executive Board of the Union sat on 11/12/2015 and sanctioned the Branch General meeting of members held on 9/1/2016.

9. The respondents deny all the particulars of claim, put the claimants to strict proof and pray the suit be dismissed with costs.

### **Evidence**

10. The 1st Claimant testified in support of the claim on 6<sup>th</sup> June, 2016.

That he resided at Kisumu and worked as a revenue collector of Kenya Power and Lighting Company and was a member of the respondent union. That he applied and was duly nominated for the position of Branch Secretary. That elections were called for 9/1/2016 in terms of the Constitution.

11. The 1st Claimant testified that Article 4 of the Union constitution required that all the top six (6) officials of the Union, to be eligible for election had to have at least 'O' level education and certificate and be employed on permanent and pensionable basis.

12. The 1st Claimant testified that the 1st respondent fell short of the said qualifications and was therefore ineligible to be elected to the position of Branch Secretary.

13. The 1st claimant testified that the 2nd and 3rd Claimants were incumbent, and therefore did not require clearance to contest.

14. The 1st Claimant testified that he attended the elections of 9/1/2016 and attached the elections register. The 1st claimant testified that the 1st respondent who was the incumbent did not produce a clearance certificate. The 1st Claimant stated that the 1st respondent was not requested to produce the 'O' level Certificate. Members raised the issue with the returning officer, Hellen Maneno to no avail.

15. The Claimant testified that the elections were conducted and six (6) branch officials were elected and announcements of the winners were made by the returning officer.

16. The claimant testified that before election of 10 branch committee members were done, elections were declared over. That this was in violation of Article 15 of the Union Constitution. That the election of the Committee members was notified in the election notice of 30/12/2015. That the elections were to be by secret ballot, pursuant to Article 17. That 5 delegates from the branch were also not elected.

17. The 1<sup>st</sup> claimant testified that he asked Hellen Maneno why elections were stopped before Committee members and delegates were elected but she told the 1st Claimant that elections were over and she left the venue.

18. The 1st Claimant testified that he filed an objection with the Registrar of Trade Unions on 12th January, 2016. That the objection was signed by 15 persons. The issues in dispute in this suit were raised in the objection.

19. The 1st Claimant testified that he had perused the employment records of 1<sup>st</sup> respondent and had found that the respondent had no 'O' level education and Certificate. That the 1st respondent did not respond to the objection raised on his qualification and has not produced an 'O' level Certificate to date.

20. The 1<sup>st</sup> Claimant testified that the evidence adduced is sufficient to have the elections nullified and the Court should do so.

21. The 1<sup>st</sup> Claimant was subjected to very close cross-examination by Mr. Sam Onyango, Advocate for the respondent. The 1st Claimant did not produce proof of his membership of the Union but insisted he was a member and had been duly cleared for election. The 1st Claimant said he has never been given a Union membership number.

22. The 1<sup>st</sup> Claimant was unable to produce any receipt as evidence of payment of union dues. He said that payment of union dues was via check off system and no receipts were given to individual members. The 1<sup>st</sup> Claimant insisted that the 1<sup>st</sup> respondent was not qualified to be elected Branch Secretary since he had no "O" level qualification and certificate and that he was unhappy with the failure by the 4<sup>th</sup> respondent to conduct secret ballot election for 10 Branch Committee members and 5 Branch delegates in terms of the election notice and the

union Constitution.

23. The 1<sup>st</sup> Claimant stated that he was surprised that the committee members and delegates had been elected according to the 4<sup>th</sup> Respondent. The 1<sup>st</sup> claimant stated that he did not make a written complaint on the date of the election. The 1<sup>st</sup> Claimant conceded that all Branch officials had been duly registered by the 4<sup>th</sup> respondent subsequently and that Returns were made around 4<sup>th</sup> January, 2016 though he had lodged his objection on 11<sup>th</sup> January, 2016.

24. The 1<sup>st</sup> Claimant insisted that the elections conducted were a sham and they be nullified by this Court.

25. R.W.1 Mr. Langat for the 4<sup>th</sup> respondent also cross examined the 1<sup>st</sup> Claimant and the 1<sup>st</sup> Claimant was unable to demonstrate that he had raised any objection with the office of the registrar as purported or at all. The 1<sup>st</sup> claimant conceded that had he succeeded in the quest for the position of Branch Secretary, he would not have filed this suit. That he was dissatisfied with the election results and failure to follow the requirements of the Union Constitution.

26. R.W.1 Vincent Ochieng Okullo, the 1<sup>st</sup> respondent testified for the respondents. R.W.1 stated that he worked for the Kenya Power and Lighting Company and was the Secretary General of the Union, Western Branch and was also the National Chairman of the Union. R.W.1 testified that he knew the 3 Claimants, and were his colleagues at the Kenya Power and Lighting Company. That the three had contested various positions of the Union in 2016. R.W.1 adopted a witness statement dated 27/1/2016 as his evidence-in-Chief.

27. R.W.1 stated that he was the incumbent Branch Secretary and had issued notice of elections to the Ministry of Labour. The Ministry had directed by a letter dated 25/11/2019 that the Union do conduct branch elections. R.W.1 stated that the elections were lawfully convened and conducted and that the elections were free, open and fair. That the returning officer was an official of the Ministry of Labour as per requirements. That the elected officials were subsequently registered as per the returns made to the 4<sup>th</sup> respondent and all the officials are duly serving in office. The change of officials was done by the registrar in a notice dated 21/1/2016. That Form Q. was submitted lawfully. R.W.1 testified that he was qualified to hold position of Branch Secretary and that he had been in the Labour movement since 1996 to date.

28. R.W.1 testified that he was exempt from the requirements of Article 44 of the Union Constitution in terms of Article 5.8.2 and 5.8.3 of the Union Constitution being the incumbent, outgoing officer.

29. Under cross examination by counsel for the Claimants Mr. Rakoro, R.W.1 stated that before 2016, elections were conducted in terms of an old Constitution registered on 8<sup>th</sup> May, 2006. That the said Constitution did not have any requirement for Academic Qualification of Union officials.

30. R.W.1 stated that the 2016 elections were in terms of the new Constitution registered on 28/9/2011. R.W.1 conceded that Article 4.4 in the new Constitution required holder of Branch office to have a minimum of 'O' level certificate. R.W.1 conceded that he had not produced any 'O' level certificate before Court. R.W.1 insisted as the incumbent, he was exempt from that requirement under Articles 5.8.2 read with 5.8.3 of the new Constitution.

31. That in terms thereof incumbents are excluded from all preliminary procedures. That incumbents simply appear at the floor of the elections meeting. R.W.1 stated that the elections were lawfully and procedurally conducted by a Labour Officer M/s Hellen Maneno. R.W.1 stated that the suit lacks merit and it be dismissed with costs.

### **Determination**

The issues for determination are:-

- (i) Whether the 1<sup>st</sup> respondent was validly elected as the Branch Secretary of KETAWU Western Branch on 9/1/2016.
- (ii) Whether the election of 10 Committee members and 5 delegates of the Branch was validly conducted.
- (iii) Whether the Claimants are entitled to the reliefs sought.

32. To answer issue (i) and (ii) above, the Court only need interpret, Article 4.4 of the Union Constitution registered on 28/9/2011 via a vis Articles 5.8.2 and 5.8.3 to determine if it was a requirement for an incumbent Branch Secretary to provide an 'O' level certificate to be eligible for re-election to the office. If the answer is in the negative, that is the end of the matter in this protracted suit.

33. Article 4.4 titled Union officials, provides:-

**“All Branch officials including shop stewards shall be literate in English and Kiswahili and with at least a minimum “O” Level education. Apart from the full time officials, all officials of the union from the level of Branch Principal Officers shall be those on permanent and pensionable terms.”**

34. To this extent the 1<sup>st</sup> respondent relies on Articles 5.8.2 and 5.8.3 for the purported exemption to subject himself to the “**Election procedure and Nomination of candidates.**” Under Article 5.8. of the Union Constitution. The Court cites the provision are as follows-

**“5.8.2- person contesting for the position of branch Secretary shall have to complete prescribed Union nomination form supported by at least 10% members of the branch in order to be eligible for the election.**

5.8.3 - the candidate who meets the above (5.8.2) requirement shall be notified by the General Secretary to participate in the elections at least one week before the election date of the respective branch. The outgoing branch Secretary shall be excluded from this provision. If need be they will offer themselves for re-election by being proposed on the floor” (emphasis mine)

37. The prescribed Election nomination form under Clause 5.8.2 a copy of which is produced by the 1<sup>st</sup> Claimant at page 45 of the Statement of Claim provide for Name of the candidate; Employer; Post to be contested; Name of the proposer and their employer and identity number and name of the seconder and their employer and seconder. The form then has slots for nominees to provide their name, employer and signatures. The form has no provision for the candidate to state their academic qualification or their job status with their employer.

38. It is apposite for the Court to note that the provisions of Articles 5.8.2 and 5.8.3 do not make any reference at all to the provisions of Article 4.4 under which the new Constitution mandates all Branch officials, including the branch Secretary to possess a minimum of ‘O’ Level education’ to be eligible for election into office.

39. Clearly, the new Constitution mandates all candidates new and incumbent branch officials to possess a minimum ‘O’ Level education.

40. The Claimants have on preponderance of evidence proved that the 1<sup>st</sup> respondent as at the time of his election to the position of Branch Secretary KETAWU, Western Kenya Branch did not have a minimum of ‘O’ Level education and Certificate. The 1<sup>st</sup> respondent has failed to rebut this credible evidence by the 1<sup>st</sup> Claimant.

41. The returning officer of the 4<sup>th</sup> respondent was not called to provide any contrary evidence to that ably adduced by the 1<sup>st</sup> Claimant.

42. Accordingly the Court finds that the 1<sup>st</sup> respondent was not eligible to be elected branch secretary of the KETAWU, Western Kenya Branch on 9/1/2016. The election of the 1<sup>st</sup> respondent was therefore in violation of the Union Constitution, and was unlawful, null and void *ab initio*.

43. The Claimants have failed to offer any tangible evidence to impugn the election of 10 Committee members and 5 delegates of KETAWU Western Kenya Branch duly elected on 9/1/2016. The Court finds this claim to be not proved at all by the Claimants.

44. In the final analysis Judgment is entered in favour of the Claimants as against the 1<sup>st</sup> and 4<sup>th</sup> Respondents as follows:-

(a) The 1<sup>st</sup> respondent was not qualified to be elected to the position of Branch Secretary KETAWU, Western Kenya Branch on 9/1/2016 and his purported election to that office was unlawful null and void.

(b) The Court has brought to Employment and Labour Relations Court the decision of change of the position of Branch Secretary pursuant to the unlawful elections held on 9/1/2016 by the Registrar of Trade Unions and the extract reflecting that change and quashed the same for being unlawful, null and void.

(c) The Registrar of Trade Unions is directed to remove the name of the 1st respondent from the register of officials of KETAWU, Western Kenya Branch and in particular in the position of Branch Secretary.

(d) The Registrar of Trade Unions is directed to conduct fresh elections in respect of the position of Branch Secretary KETAWU, Western Kenya Branch.

(e) Costs to follow the event against the 1<sup>st</sup> and 4<sup>th</sup> respondents.

45. The Court notes that this suit has taken about 4 years to conclude and the 1<sup>st</sup> respondent has occupied the impugned position for almost his entire term. To avoid this unjust situation, the stakeholders need to propose legislation to have Union election disputes to be adjudicated upon by Courts within limited time frames in line with the manner of adjudication of General elections as presently conducted in Kenya. Since no general damages are sought by the Claimants, none is granted.

**Dated and delivered at Nairobi this 27<sup>th</sup> day of November, 2020.**

**MATHEWS N. NDUMA**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020, this judgment has been delivered to the parties online with their consent. 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, this 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 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)** which impose on this 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.

**MATHEWS N. NDUMA**

**JUDGE**

**Appearances**

**Mr. Rakoro for claimants**

**Mr. Sam Onyango for 1st 2nd and 3rd respondent**

**Mr. Langat for the 4th respondent.**