



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

PETITION 569 OF 2019

(BEFORE HON. JUSTICE HELLEN S. WASILWA ON 24TH SEPTEMBER, 2019)

HON. WILSON SOSION.....CLAIMANT/APPLICANT

V E R S U S

1. WYCLIFFE ETOLE OMUCHEYI.....1ST RESPONDENT

2. COLLINS HENRY OYUU.....2ND RESPONDENT

3. ROSALIA MKANJALLA.....3RD RESPONDENT

4. HESBON OTIENO OGOLLA.....4TH RESPONDENT

5. CLEMENT OKELLO OMOLLO.....5TH RESPONDENT

6. JOHN MATIANGI.....6TH RESPONDENT

7. JAMES NDIKU.....7TH RESPONDENT

8. ALI ABDI HUSSEIN.....8TH RESPONDENT

9. BONIFACE TENAL.....9TH RESPONDENT

10. JOHN MUNYI GITARI.....10TH RESPONDENT

11. NGUMA FREDRICK K.....11TH RESPONDENT

12. DANSON MACHARIA MUGWE.....12TH RESPONDENT

13. MODESTA L. AKAKI.....13TH RESPONDENT

14. KULLOW MOHAMED SHEIK.....14TH RESPONDENT

15. BASHIR ABDULLAHI ODOWA.....15TH RESPONDENT

16. NASTEHA ALI MOHAMMED.....16TH RESPONDENT

17. ALI NGANGA.....17TH RESPONDENT

18. DAN ALOO.....18TH RESPONDENT

19. WARDABDALLA MOHAME.....	19 TH RESPONDENT
20. JOHN M. KARANU.....	20 TH RESPONDENT
21. MICHAEL N. M. MUNA.....	21 ST RESPONDENT
22. ANNE WAIRIMU NJOROGE.....	22 ND RESPONDENT
23. JAVAN MURERA WACHIRA.....	23 RD RESPONDENT
24. MICHAEL KASIMBA NGUI.....	24 TH RESPONDENT
25. JONATHAN K. MUTAMBU.....	25 TH RESPONDENT
26. AGNES KAMBUA MUSEE.....	26 TH RESPONDENT
27. JULIUS TAITUMU MUNAIBA.....	27 TH RESPONDENT
28. PAUL ROCHE AGALO.....	28 TH RESPONDENT
29. ELIUD O. OMBORI.....	29 TH RESPONDENT
30. HILDA OTIENO.....	30 TH RESPONDENT
31. KENNEDY NYAMWANDA ONDIEKI.....	31 ST RESPONDENT
32. JOSHUA CHEBOI CHEPTARUS.....	32 ND RESPONDENT
33. JOSPHAT K. SEREM.....	33 RD RESPONDENT
34. RAPHAEL LESHALOTE.....	34 TH RESPONDENT
35. EMILY C. KIRUI.....	35 TH RESPONDENT
36. MARTIN ERIS SEMBELO.....	36 TH RESPONDENT
37. DORCAS JACINTA KIPTOO.....	37 TH RESPONDENT
38. MURUMBA NAMISI.....	38 TH RESPONDENT
39. JOHN WESONGA LUTTA.....	39 TH RESPONDENT
40. EMILY MITO BARAZA.....	40 TH RESPONDENT
41. MARK OSENO HANINGTON.....	41 ST RESPONDENT

RULING

1. Pending for my determination at this point in time is a total of Four (4) Applications filed by both parties to this Claim.
2. Firstly, there is an Application filed on 28th August, 2019 by the Claimant, the Honourable Wilson Sosion, in which Application the Applicant seeks the following **ORDERS**:-

1. THAT this Application be certified as urgent to be heard ex-parte at the first instance.

2. THAT this Honourable Court be pleased to issue an injunctive order directed to the Respondents, their servants and/or agents restraining them directly or indirectly from convening, attending and/or proceeding with the KNUT NEC meeting scheduled for 29th August 2019 or any other date pending hearing and determination of this Application.

3. THAT this Honourable Court be pleased to issue an injunction order directed to the Respondents their servants and/or agents restraining them directly or indirectly from convening, attending and/or proceeding with the KNUT NEC meeting

scheduled for the 29th August 2019 or any other date pending hearing and determination of this suit.

4. THAT the Respondents be condemned to pay costs to pay the costs of this Application.

5. THAT the costs of this Application be in the suit.

3. The Application is premised on the following grounds **THAT**:-

a. The Respondents have threatened to proceed to attend KNUT NEC meeting set for 29th of August, 2019 despite its postponement.

b. The Respondents have no power under the KNUT Constitution to convene and/or proceed with a National Executive Council Meeting that has been postponed.

c. The Respondents are targeting the unconstitutional removal of the Applicant.

d. The Applicant is likely to suffer irreparable loss and risk to suffer irreparable loss and risk should the meeting of 29th August, 2019 proceed.

e. It is in the interest of justice and fair play that the Orders sought herein be granted.

4. The Application is supported by the Affidavit of **HON. WILSON SOSION**, the National Secretary General of the Kenya National Union of Teachers and the Claimant herein, sworn on 26th August, 2019 in which affidavit the Claimant/Applicant reiterated the averments made in his Notice of Motion Application.

5. The said application filed under certificate of urgency was heard by my brother **Hon. Justice Byram Ongaya** on 28th August, 2019 and the following Orders were granted:-

1. THAT the Application is hereby certified urgent.

2. THAT pending the hearing and determination of the instant suit, an order is hereby issued staying the suspension of the Applicant by the Respondents directed against the Interested Party touching on the decision made on 29th August, 2019.

3. THAT the status quo of the KNUT register of officials obtaining prior to the 29th day of August, 2019 to be maintained with regard to the operations of the KNUT Bank accounts at Kenya Commercial Bank, Equity Bank and Standard Chartered Bank pending further orders of the Court.

4. THAT the Application be served upon the Respondents and be heard inter partes on a date agreed upon on 3/9/2019.

6. This matter was thereafter scheduled for hearing of the Application on 3rd September, 2019 when Omogeni Senior Counsel on record for the Respondents herein prayed that this Honourable vacates its orders issued on 2nd September, 2019 as the Registrar of Trade Unions had already effected changes of the officials of KNUT and that consequently the Claimant does not appear in the said register as an official of the said union and cannot therefore act on behalf of the union.

7. The Respondent was directed by the Court to file a formal Application to vacate the said Orders of 2nd September, 2019. The Court went on to consolidate this matter with Cause No. 579 of 2019, in which case the 1st Claimant (Kenya National Union of Teachers) and the 2nd Claimant (Hesbon Otieno Agola) through their Advocates on record Ochieng' & Alogo & Company Advocates filed an Application dated and filed in Court on 2nd September, 2019 seeking the following orders:-

1. THAT the matter herein be certified as urgent and heard ex-parte in the first instance during the Court vacation.

2. THAT pending hearing and determination of this Application the Court be pleased to issue an order compelling the Respondent to officially handover, surrender all the tools of power and all the keys of the Claimant's offices to the Claimant forthwith.

3. THAT pending hearing and determination of this suit the Court be pleased to issue an order compelling the Respondent to officially handover, surrender all the tools of power and all the keys of the Claimant's offices to the Claimant forthwith.

4. THAT pending hearing and determination of this Application the Court be pleased to issue an order restraining the Respondent, his servants, agents and/or anybody acting under his instructions from going to the Claimant's offices, issuing statements for and on behalf of KNUT, communicating and passing any information on behalf of KNUT and/or transacting any activities on behalf of KNUT.

5. THAT pending hearing and determination of this suit the Court be pleased to issue an order restraining the respondent, his servants, agents and/or anybody acting under his instructions from going to the Claimant's offices, issuing statements for and on behalf of KNUT, communicating and passing any information on behalf of KNUT and/or transacting any activities

on behalf of KNUT.

6. THAT the costs of this Application be borne by the Respondent

8. The Application was filed under Certificate of Urgency through a Notice of Motion filed under Rule 16 (1-4) of the Employment and Labour Relations Court Rules, Rule 3(2) of Part I of the High Court (Practice & Procedure) Rules made under Section 10 of the Judicature Act, Cap 8 of the Laws of Kenya and all enabling provisions of the law.

9. This Application is premised on the grounds **THAT**:-

a. The 1st Claimant is a former employer of the Respondent who has been its Secretary General prior to his legal and regular expulsion from office.

b. On 28th August, 2019 the Respondent unilaterally purported to close the offices of the Claimant without consultation or any reasonable cause hence leading to paralysis of the duties of the Claimant and thereafter released a press statement.

c. The Respondent has proceeded with his illegal and malicious actions despite the fact that he has been procedurally suspended awaiting to be heard at the Annual Delegate Conference which is yet to be held.

d. The Respondent's malicious action of shutting down the 1st Claimant's offices has happened at a time when schools are opening and the union needs seamless operations to serve its members.

e. The Respondent has further gone ahead to issue statements, call for meetings, write letters and give directions on behalf of the 1st Claimant despite the fact that he has been duly and legally suspended from office.

f. The Respondent has no justifiable cause whatsoever to continue holding office and transacting on behalf of the 1st Claimant as the 1st Claimant has duly effected changes including the names of the Register of Trade Unions, officers, Committee Members and Trustees.

g. The Claimant aver that the actions of the Respondent are malicious , self- centred and have brought a lot of disrepute to the Union.

h. The 1st Claimant through the meeting of the National Executive Council members held on 29th August, 2019 resolved to expel the Respondent in accordance with the union's Constitution.

i. The resolution was done by all Twenty- Nine (29) members who attended the meeting.

j. The National Executive Council made the decision based on the Respondent's unbecoming conduct which include.

i. Refusal to execute decisions of NEC as arrived at various meetings.

ii. Singularly employing permanent staff of the Claimant without consulting NEC.

iii. Sacking and sending on compulsory leave full time employees without consulting NEC.

iv. Issuing Notices of strike without resolution of the relevant organs.

v. Attacking and assaulting senior government officials against advice of NEC thus bringing disrepute to the union's membership.

k. The Respondent further took away the keys of the premises leaving other workers stranded as the purported Notice of closure was too short.

l. The Claimant contends that the aforesaid un-procedural closure of its offices was unlawful and unfair and the Claimant has suffered loss and damage.

m. The Claimant avers that the actions of the Respondent are malicious, self-centred and have brought a lot of disrepute and disruptions to the union.

n. UNLESS this Application is heard urgently during Court vacation and the orders sought granted, the Claimant's operations will be paralysed which was cause great prejudice and irreparable loss to the union and its members.

10. The Application is supported by the Affidavit of **HESBON OTIENO AGOLA** sworn on 2nd September, 2019, in which he reiterates the averments made in the Notice of Motion Application.

11. The Respondents through their Advocate on record filed the Application filed on 4th September, 2019 as directed by this Honourable Court on 3/9/2019, which Application seeks the following orders:-

- 1. THAT the matter herein is certified as extremely urgent and heard ex-parte in the first instance during Court vacation.**
- 2. THAT pending inter-partes hearing of this Application this Honourable Court be pleased to stay the ex-parte Order issued on 2nd September, 2019 in this matter.**
- 3. THAT Honourable Court be pleased to set aside and discharge ex-parte order issued on 2nd September, 2019 in this matter.**
- 4. THAT the costs of this Application be borne by the Respondent.**

12. The Application is premised on the following grounds **THAT**:-

- a. The Claimant is the former employer of the Respondent who has been its Secretary General prior to his legal and regular suspension from office.**
- b. On 2nd September, 2019, the Claimant herein obtained ex-parte Orders against the Respondents through non- disclosure and misrepresentation of material facts.**
- c. The Claimant deliberately failed to disclose to the Honourable Court that the ex-parte Orders that he had earlier obtained on 28th August, 2019 and requested the Honourable Court's leave to serve the same through substituted service were only served on 30th August, 2019.**
- d. Claimant also misled the Court that he served the Order to the National Chairman of NEC personally yet no service was effected whatsoever.**
- e. The Claimant also failed to disclose to the Honourable Court that he had not amended his Memorandum of Claim to include an interested party who substantive orders were issued against.**
- f. The Respondents and the Interested Party were condemned unheard based on misrepresentation of material facts.**
- g. It is just and equitable in the circumstances of the case that the applications be heard during the current Court's Vacation.**
- h. The Respondents avers that the actions of the Claimant are fraudulent, deceitful, malicious, self-centred and have brought a lot of disrepute and disruptions to the Union.**
- i. Unless this Application is heard urgently during the Court vacation and the Orders sought granted, the Claimant's operations will be paralysed which will cause great prejudice to the Union.**

13. The Application is supported by the Affidavit sworn by **HESBON OTIENO AGOLA**, the acting Secretary General of KNUT on 4th September, 2019, in which he reiterates the averments made in the Notice of Motion Application adding that the Claimant having been deregistered by the Teacher's Service Commission ceased being a member of the union in accordance with Article III (9) of KNUT Constitution.

14. It is further contended that the Respondents through the meeting of the National Executive Council members held on 29th August, 2019 resolved to suspend the Claimant in accordance with the KNUT Constitution. It is further contended that the decision was warranted by the Claimant's actions.

15. It is the Respondents' argument that the Claimant has no justifiable cause to continue holding office and transacting on behalf of KNUT as the union already made the necessary changes of its officials with the registrar of trade unions.

16. The Application is further supported by the Affidavit sworn by **WYCLIFFE OMUCHEYI**, the National Chairman of the Kenya National Union of Teachers on 4th September, 2019 in which he reiterates the averments made in both the Application and the Supporting Affidavit sworn by **HESBON OTIENO AGOLA**.

17. In response to this Application the Claimant filed a Replying Affidavit sworn on 6th September, 2019, in which he avers that the court order of 28/8/2019 were duly served on the Union's Chairman personally and that another was served by way of substituted service.

18. He further contends that he is the duly elected Secretary General of KNUT and that the Union's Constitution does not in any way expressly provides for vacation of office on grounds of ceasing to be a member of the Teacher's Service Commission. He further contends as the sitting Secretary General he did postponed the meeting scheduled for 29th August, 2019 via a letter to NEC Members dated 26th August, 2019.

19. He stated that this Honourable Court's Orders given on 2nd September, 2019 stayed the purported decision to suspend him as the General

Secretary of the Union and that he continues to hold the office. He further contends that the application dated 4th September, 2019 is therefore misconceived and is an abuse to the Court process. The Claimant urged this Honourable Court to dismiss the same with costs.

20. It is clear from the said Application that the meeting of the National Executive Council took place despite the Orders of 28th August, 2019 prompting the Claimant herein to file yet another Application dated 9th September, 2019 seeking the following Orders:-

1. THAT this Application be certified as urgent to be heard ex-parte in the first instance.

2. THAT this Honourable Court be pleased to find and hold that the following Respondents to be in contempt of the Court Orders issued herein on the 28th of August and 2nd of September, 2019 respectively Wycliffe Etole Omucheyi-1st Respondent, Collins Henry Oyuu-2nd Respondent, Rosalia Mkanjalla-3rd Respondent, Hesbon Otieno Agolla-4th Respondent, Clement Olcello Omollo-5th Respondent, John Matiangi-6th Respondent, James Ndiku-7th Respondent, Ali Abdi Hussein-8th Respondent, Boniface Tenai-9th Respondent, John Munyi Gitari—10th Respondent, Nguma Fredrick K-1 1th Respondent, Danson Macharia Mugwe-12th Respondent, Modesta L. Akaki-13th Respondent, Kullow Mohamed Sheik- 14th Respondent, Bashir Abdullahi Odowa- 15th Respondent, Nasteha Ali Mohammed-16th Respondents, Ali Nganga- 17th Respondent, Warda Abdalla Mohamed-19th Respondent, John M. Karanu-20th Respondent, Michael N. M. Muna-21st Respondent, Anne Wairimu Njoroge-22nd Respondent, Javan Murera Wachira-23rd Respondent, Michael Kasimba Ngui -24th Respondent, Jonathan K. Mutambu-25th Respondent, Agnes Kambua Musee-26th Respondent, Paul Roche Agalo - 28th Respondent, John Wesonga Lutta - 39th Respondent, Emily Mito Baraza - 40th Respondent and the Registrar of Trade Unions - The Interested Party herein in contempt and to be subsequently committed to Civil Jail for a period not exceeding 6 months pending the full compliance with the Honourable Court's aforesaid orders.

3. THAT this Honourable Court be pleased to deny the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 19th, 20th, 21st, 22nd, 23rd, 24th, 25th, 26th, 28th, 39th, 40th Respondents and the Interested Party audience in this matter until and unless they purge the contempt of court actions that they have committed herein.

4. THAT the Respondents and Interested Party be ordered to pay for the costs of this Application.

21. The Application is premised on the grounds that:-

a. THAT on the 28th August, 2019, this Honourable Court issued Orders directing that the meeting convened by the Applicant scheduled to be held on Thursday 29th August 2019 stood postponed.

b. THAT on the 2nd September, this Honourable Court further issued Orders staying the suspension of the Applicant by the Respondents directed to the Interested Party touching on the decision made on the 29th August 2019.

c. THAT despite having been duly served with the order, the Respondents have elected to disobey the Court order and have held the postponed meeting on the 29th of August, 2019 as well as Suspended the Applicant contrary to the Court Orders.

d. THAT it is the plain and unqualified obligation of every person against, or in respect of whom an order is made by a Court of competent jurisdiction to obey it unless and until that order is varied, discharged and/or set aside.

e. THAT the Respondents and Interested Party's actions herein are an upfront attack on the integrity of our judicial process and the rule of law which actions must not be countenanced.

22. The Application is supported by the Affidavit of the Claimant/Applicant in which he reiterates the averments made on the face of the Notice of Motion Application.

23. Parties agreed to proceed orally when the matter was listed for hearing on 10th September, 2019. Omogeni Senior Counsel on record for the Respondents herein submitted the Court ought to allow their application dated 4th September, 2019 as the orders in this matter were obtained on 28th August, 2019 and that the Claimant is guilty of material non-disclosure of material facts.

24. The Counsel further submitted that for those orders to be effective they ought to have been served on 29th August, 2019 and not on 30th August, 2019 as the NEC meeting had already taken place on 29th August, 2019.

25. Counsel further submitted that the Respondents' only became aware of the Court Order of 28th August, 2019 on 30th August, 2019 when the same was served by way of substituted service through print media and that the Affidavit of Service filed failed to indicate who identified the 1st Respondent to the process server for purposes of service. The Respondent therefore contends that they are justified to pray for setting aside and/or vacation of the Court Orders.

26. The Respondents further contend that the Claimant in his Replying Affidavit has failed to give an explanation, as to why the Court Orders issued on 28th August, 2019 were not served on 29th August, 2019.

27. The Respondent avers that the Claimant's assertion about the union funds is untrue and misleading by dint of Article 12 of the KNUT Constitution provides that the Union's Treasurer is the one who opens accounts on behalf of the union and ensures all monies belonging to

the union are kept in safe custody and not the Secretary General as pleaded by the Claimant herein.

28. It is further the Respondents' submission they rightfully attended the NEC meeting where the members present excised their powers as provided under the KNUT Constitution to suspend the Claimant from his position as Secretary General of the Union.

29. The Respondents' contend that the balance of convenience tilts in their favour and thus urged this Honourable Court to allow their Application as prayed.

30. Guserwa, Counsel on record for the Claimant herein submitted that the Order issued by the Honourable Judge Justice Bryam Ongaya was duly served personally on the 1st Respondent in his capacity as the Chairman of the NEC Counsel in the manner indicated in the return of service filed in Court.

31. She further submitted that the 29 members, who attended the NEC Meeting on 29th August, 2019 therefore were in contempt of Court and urged this Court to find them as such.

32. Counsel further submitted that the meeting held on 29th August, 2019 violates the provisions of Article 19 of the KNUT Constitution that provided that such meetings shall be convened by the Secretary General and that notice of such meetings shall be sent at least 2 weeks before the proposed date for the meeting.

33. Counsel further contends that the Claimant needs only prove that the Order of 28/8/2019 was duly served which was duly done and a return of service filed evidencing the same. She further urged this Honourable Court to find the Respondents in contempt of the Court Orders issued on 28/8/2019 and allow the Application as prayed.

34. I have considered the averments of both Parties. There are basically 2 issues to determine:-

1. Whether the Respondents herein acted contemptuously towards this Court's orders dated 28/8/2019.

2. Whether this Court can set aside its orders of 2/9/2019.

35. On the first application for contempt by the Applicant herein, the Applicant has averred that on 28.8.2019, this Court issued orders in the following terms:-

1. THAT the Application is hereby certified urgent.

2. THAT pending the hearing and determination of the instant suit, an order is hereby issue staying the suspension of the Applicant by the Respondents directed against the Interested Party touching on the decision made on 29th August, 2019.

3. THAT the status quo of the KNUT register of officials obtaining prior to the 29th day of August, 2019 to be maintained with regard to the operations of the KNUT Bank accounts at Kenya Commercial Bank, Equity Bank and Standard Chartered Bank pending further orders of the Court.

4. THAT the Application be served upon the Respondents and be heard inter partes on a date agreed upon on 3/9/2019.

36. The matter was thereafter rescheduled for hearing on 3/9/2019. On 2/9/2019, the Applicant filed the application seeking to reinstate the Applicant to office following what he termed acts by the Respondent calculated at defeating this Court's order of 28/8/2019. There followed yet another application dated 9/9/2019 in which the Applicants want the Respondent's cited for contempt of this Court's order dated 28/8/2019.

37. In respect of the application of 9.9.2019 the Applicants have averred that they served the Court's order of 28/8/019 upon the Respondents alleged contemnors including the Registrar of Trade Union, the Interested Party herein.

38. There is evidence of service of these orders upon the 1st Respondent herein as per the Return of Service filed in Court. There is however, no evidence that the order was served upon other members of NEC before their meeting on 29th August 2019 as the substituted service of the order was made on 30th August 2019 after the meeting on 29th August 2019.

39. As for service upon the Registrar of Trade Union – the Interested Party herein, there is also evidence of service upon the office dated 29th August 2019 (page 2 of Applicant's documents attached to the Application dated 2.9.2019. The Interested Party has not controverted the claim that she was served with the letter on 29.8.2019 at 9 am.

40. In the circumstances and as per the evidence of the case, it is obvious that the 1st Respondent proceeded to preside over a NEC meeting despite service and contrary to the Court orders of 28/8/2019. The Registrar of Trade Union also proceeded to effect the charges as per the NEC meeting despite information to the contrary.

41. In the circumstances, I find 1st Respondent and Interested Party guilty of contempt of this Court's orders of 28/8/2019.

42. Application to cite the other Respondents for contempt is dismissed for want of service.

43. As for the application to set aside the orders of 2.9.2019, in view of my finding that the 1st Respondent and Registrar of Trade Union acted in contempt of this Court's orders of 28/8/2019, the orders will not be set aside but will remain in force until the contempt is either purged or until Respondents show why they should not be punished for contempt.

44. Costs in the cause.

Dated and delivered in open Court this 24th day of September, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Guserwa for Claimant – Present

Ochieng for Respondent – Present