



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NO. 616 OF 2017

BETWEEN

- 1. HARRISON OTIENDE**
- 2. JAMES MAINA**
- 3. MOHAMMED MWINYI**
- 4. ABDI M. SHEIKH**
- 5. ABDI RAHMAN NASSIR**
- 6. JOSEPH N. CHWEYA.....CLAIMANTS**

VERSUS

- 1. BANDARI SACCO LIMITED**
- 2. SECRETARY GENERAL, DOCK WORKERS UNION.....RESPONDENTS**

AND

- 1. BARCLAYS BANK LIMITED**
- 2. DOCK WORKERS UNION (K).....INTERESTED PARTIES**

Rika J.

Court Assistant: Benjamin Kombe

John Magia & Company Advocates for the Claimants

Rufus Ochieng', Executive Officer for the 2nd Respondent

Akanga Alera for & Associates, Advocates for 1st Respondent

Mr. Harun Ndubi Advocate for 2nd Interested Party

RULING

1. The 6 Claimants filed their Joint Statement of Claim on 31st July 2017. They state they are Members of the Dock Workers Union, the 2nd Interested Party herein. They are employed by Kenya Ports Authority (KPA) and make monthly trade union subscription fees to their Union.
2. Their contributions are deposited/or invested at Bandari Sacco Limited, the 1st Respondent herein. The Claimants discovered on or around June 2017, that the Respondents jointly were processing a credit facility/ or loan facility to be secured by funds held by the 1st Respondent in the 2nd Interested Party's Welfare Account, No. 1000962.
3. The signatures of Bandari Sacco Account No. No. 1000962 and Mombasa Barclays Bank Account No. 0161093734 belonging to the 2nd Interested Party, were irregularly and unlawfully changed with the intention of obtaining credit facility to a 3rd Party. Relying on Section 41 of the Labour Relations Act 2007, the Claimants pray for Judgment against the Respondent for:-
 - a) A permanent injunction restraining the Respondents by themselves or their factors, from withdrawing/encumbering/paying out Claimants' funds held in Bandari Sacco Account No. [...] or those held at Mombasa Barclays Bank Account No. [...] in the name of the Dock Workers Union.
 - b) Respondents be held personally liable for any and every loss the Claimants might and/or will incur due to illegal/unlawful appropriation of funds.
 - c) There be a recall of Signatories of the two Accounts, and fresh appointment done in accordance with the Constitution of the Dock Workers' Union.
 - d) Any other suitable relief.
 - e) Costs of the Claim.
4. The Claimants made an Application for interim measures, seeking protection of their funds, pending hearing and determination of the Claim. The Court issued interim orders on 3rd August 2017. The orders have subsequently been extended and varied to suit the requirements of the Parties.
5. The Respondents and the 2nd Interested Party have raised points of preliminary objection. Their objection was heard on 14th February 2018.
6. The main points of objection are that some of the Claimants are not shown to have given their authority to the 1st Claimant, to present and prosecute the Claim; the Claim does not meet the requirements of Section 41 of the Labour Relations Act 2007; and the Court lacks jurisdiction under Co-operative Societies Act Cap 490, Laws of Kenya. On the periphery is the argument that the Claimants have not invoked the internal dispute resolution mechanisms available to the Parties, under the 2nd Interested Party's Constitution, before filing of the Claim.
7. Representatives of 2nd Respondent, the 2nd Interested Party, and the Claimants addressed the Court on these preliminary issues, on 14th February 2018. The 1st Respondent filed its Submissions focusing on lack of jurisdiction of this Court, under the Co-operative Societies Act.
8. The Preliminary Objectors submit the Court lacks jurisdiction under Section 76, of the Co-operative Societies Act. The dispute herein involves: Members supporting grant of loan, who are represented by the Dock Workers Union; Members opposing grant of the loan; Guarantors who secured the loan by virtue of their individual shares; and Bandari Sacco. The forum with jurisdiction in this dispute, is the

Co-operative Tribunal. The High Court affirmed jurisdiction of this Tribunal in disputes of the nature herein, in *Adero & Another v. Ulinzi Sacco Society Limited* [2002] 1 KLR 577.

9. Secondly, the Preliminary Objectors state Section 41 of the Labour Relations Act, requires Applicants for an order of injunction, have to be 5 or more Persons, having sufficient interest in the reliefs sought. These elements have not been established by the Claimants.

10. Thirdly, and related to the second point at paragraph 9 above, is the Submission that only some, not all, of the Claimants gave authority to the 1st Claimant to appear, plead and act for all of the Claimants in the proceedings. It is indicated in the Authority and Consent filed on 31st July 2017, that unknown person signed for James Maina, the 2nd Claimant herein. This default extends to the 5th Claimant, Abdi Rahman Nassir.

11. The Claimants answer they are bona fide Members of the 2nd Interested Party, and have correctly invoked the jurisdiction of the Court, under Section 41 of the Labour Relations Act.

12. Bandari Sacco is just a custodian of Members' funds. The issue at the heart of the dispute, is mismanagement of Dock Workers' funds by their Union Officials. The Sacco is only joined to safeguard Members' funds.

13. The authority donated by Co-Claimants to the 1st Claimant to appear, plead and act, is properly given and valid. The 2nd Interested party has internal dispute resolution mechanism. It has failed to apply this mechanism leaving the Claimants with no alternative, but to seek intervention of the Court under Section 41 of the Labour Relations Act.

The Court Finds

14. The Court agrees with the Claimants, that this is a dispute which falls within the jurisdiction of the Court, under Section 41 of the Labour Relations Act, rather than a dispute between a Co-operative Society and its Members, drawing in the Co-operative Societies Tribunal.

15. The dispute is about injunction to restrain Dock Workers Union from misuse of Members' funds. The Sacco is joined to the proceedings as the repository of these funds. The Claimants seek to have their Union barred from processing a credit facility to a 3rd Party, secured by Union Members' deposits held at Sacco Account. Barclays Bank of Kenya, which has no relationship with the Sacco, is named as one of the Interested Parties. The dispute has closest connecting factors with Section 41 of the Labour Relations Act, rather than Section 76 of the Co-operative Societies Act. Preliminary point of objection based on Section 76 of the Co-operative Societies Act, on jurisdiction of the Court, is rejected.

16. The Court has repeatedly implored the Dock Workers Union, in this and related disputes, to invoke its internal dispute resolution mechanisms, to resolve the festering disputes. There is no indication that the Union has the capacity to resolve its disputes internally. The Claim cannot fall, solely on the ground that the Claimants have failed to invoke internal dispute resolution mechanisms. The Union Leadership, must be willing to engage its internal mechanisms objectively.

17. The last point relates to Authority and Consent to appear, plead and act. This is related to the requirements of Section 41 of the Labour Relations Act.

18. Rule 9 of the Employment and Labour Relations Court (E&LRC) Rules 2016, states a Claim may be instituted by one Party on behalf of other Parties, with similar cause of action. Rule 9 (2) requires where a suit is instituted by one person, that person shall in addition to the Statement of Claim, file a letter of authority, signed by all other Parties. In appropriate circumstances, the Court may dispense with this requirement. Rule 9(3) states the Statement of Claim shall be accompanied by a schedule of the other Claimants and their personal details.

19. The Claimants filed Authority and Consent on 31st July 2017. The 1st Claimant swore a Verifying Affidavit, stating he has the Authority to act for his Co-Claimants. The Co-Claimants are named in the Statement of Claim rather than in a separate schedule, contemplated under Rule 9(3). There is no doubt the 1st Claimant is the Lead Claimant, and acts on the Authority said to have been given by the Co-Claimants, in the Authority and Consent filed on 31st July 2017.

20. Rule 9 of the E&LRC Rules, and its equivalent Rule under the Civil Procedure Rules, requires Authority, where one Claimant seeks to appear, plead and act on behalf of others, is signed by all the authorizing Claimants.

21. The Authority and Consent filed by the Claimants on 31st July 2017, fails to establish that all the Claimants signed the document, and authorized the 1st Claimant to appear, plead and act for all the Claimants.

22. An unknown person is indicated to have signed for James Maina, the 2nd Claimant. The signature on James Maina's slot, resembles that on the 6th Claimant's slot, Joseph Chweya's.

23. For the 5th Claimant Abdi Rahman Nassir, it is simply indicated 'for ABDI.' There is no signature, just the name ABDI. With regard to the 3rd Claimant, the name Mohammed Mwinyi appears written by hand. It is not clear if Mohammed Mwinyi signed the Authority and Consent. It is definite however, that 2 of the Claimants, James Maina and Abdi Rahman Nassir, did not themselves, sign this crucial document, enabling the 1st Claimant to present and prosecute the Claim. The Claimants did not explain this default in their Submissions. They merely stated that the Authority is signed by all the 5 Claimants. The Claimants who did not sign have not been shown to suffer some form of incapacity. Undisclosed persons signed on their behalf.

24. Without establishing that the 2 Claimants authorized the 1st Claimant to appear, plead and act for all the Claimants, the Claimants have not satisfied Section 41 of the Labour Relations Act, which requires there are 5 or more persons having sufficient interest in the relief sought, in an Application for Injunction to restrain misuse of Union funds.

25. The defect in the Authority and Consent, has effect on the personal jurisdiction of the Court, under Section 41 of the Labour Relations Act. This is not a matter of technicality, remediable under Article 159 of the Constitution, but is a matter affecting the personal jurisdiction of the Court. The Claimants have not shown that there are at least 5, or more Claimants, with sufficient interest in the reliefs sought. The Court underlined the importance of Authority to appear, plead and act, in ***Noah Rotich & Others v. Union of Kenya Civil Servants & Others [2018] e-KLR.***

26. As indicated elsewhere in this Ruling, there are other cases pending before this Court, relating broadly, to the management of the Dock Workers Union, not just financial management. The main dispute is Petition Number 11 of 2017.

27. The Court gave orders in the Petition above barring the 2nd Respondent herein, and the 2nd Interested Party, from suspending the National Chairperson Mohamed Sheria, Treasurer Joseph Sialo Makero and Assistant National Chairperson Gunda Kaneno.

28. The Court restrained Salim Bambaulo, Martha Mwaka, Nana Mote and Gladys Chepkorir, from acting as National Chairperson, Assistant National Chairperson, National Treasurer and Assistant National Treasurer.

29. These orders remain in force, until Petition Number 11 of 2017 is heard and determined, or unless these orders are lawfully stayed.

30. It is important to emphasize that the National Treasurer is central to financial management of the

Union. Under Article 17(5) of the Union Constitution, the National Treasurer supervises the financial affairs of the Union. Under Article 19, the National Treasurer must account for all monies received by the Union, and must sign all cheques for withdrawal of money.

31. The record in this Cause and in Petition Number 11 of 2017, shows that attempts have been made to inhibit the National Treasurer in exercising his role under the Union's Constitution. The Registrar of Trade Unions has been approached to effect certain changes in the Union Leadership, even though Leaders were elected only recently.

32. The Claimants herein complain about irregular change of bank signatories.

33. It is noted the orders made in Petition Number 11 of 2017 are still in force. The National Treasurer must continue to supervise all the financial affairs of the Union, including those affairs upon which the Claim herein, is founded. He remains signatory in all financial transactions involving the Dock Workers Union.

34. If properly moved, and it is shown that there is financial mismanagement of any form, the Court shall not hesitate to invoke its jurisdiction under Section 41 of the Labour Relations Act, grant injunction as sought, or even cancel registration of the Dock Workers Union and order Dock Workers Union's funds are placed under the Public Trustee for disposal.

35. For now, the Court finds it has not been properly moved.

IT IS ORDERED:-

a) The Preliminary Objection with respect to Authority and Consent to appear, plead and act, is sustained.

b) The Claim is struck out, with no order on the costs.

Dated and delivered at Mombasa this 20th day of March 2018.

James Rika

Judge