



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

APPEAL NO. 1 OF 2018

MUHAMMUD SAID SULEIMAN.....1ST APPELLANT/APPLICANT

RICHARD R. CHESEREM.....2ND APPELLANT/APPLICANT

VERSUS

THE REGISTRAR OF TRADE UNION.....RESPONDENT

RAPHAEL OUMA OLALA.....INTERESTED PARTY

JUDGMENT

Introduction

1. This is an appeal from the decision of the Registrar of Trade Unions to register the Interested party herein, one Raphael Ouma Olala as the Acting General Secretary of the Kenya Petroleum and Oil Workers Union (KPOWU). The decision was communicated by notice to the union dated 22.1.2018. The appeal is premised on ground that Registrar erred in law and fact when she disregarded the law, evidence, the constitution of KPOWU and proceeded to register the Interested Party as the Ag. General Secretary of the Union. The appeal was heard on 1.3.2018 after the parties agreed to abandon the Notice of Motion dated 26.1.2018.

Appellants Case

2. Mr. Wambola advocate persecuted the appeal. He submitted that the Respondent erred in law and fact when he registered the Interested Party as the Ag. General Secretary of KPOWU in total disregard of the law, facts and the Union Constitution. He further submitted that on 20.12.2017 the Court in *ELRCC NO. 2429 OF 2017 KPOWU Vs George Okoth and the Registrar of Trade Unions* directed the Respondent herein to resolve the issued of who becomes the Acting General Secretary between the two deputies, in accordance with the union's constitution and thereafter supervise the election of the substantive National GeneralSecretary within 3 months.

3. Mr. Wambola contended that under clause 12.3 of the union constitution, a person is only qualified to hold the position of the union General Secretary if he/she has worked in the Petroleum and Oil Industry for 10 years or has worked for a trade union as a General Secretary or Deputy General Secretary or Assistant General Secretary for a period of not less than 5 years. In his view, the Interested Party is not eligible for the position of General Secretary of KPOWU because he lacks the qualifications provided under clause 12 of the union's constitution. He submitted that the Claimant has never worked in the oil industry at all and if what he depones in paragraph 7 of his Replying Affidavit is anything to go by, then he only worked for only one year. He however maintained that the interested party has not adduced any appointment letter or any other form of evidence to prove that he was ever employed in the oil industry.

4. He further contended that the Interested Party never paid any subscription to the union and as such, he was never a member of the union despite him having been elected as an official of the union for some time. He observed that the Interested Party has not produced any evidence to prove that he was paying his union subscription and he has not produced a copy of his membership card. He submitted that a member of the union must not only be an employee in the oil industry but must also pay subscription fee. He further submitted that a person cannot stand for any branch or National office if he is in subscription fees arrears for 13 months. He cited *Kituo Cha Sheria Vs John Ndirangu [2013] eKLR* page 17 & 44 to urge that the Interested Party's repeated wrongs do not make a right. He urged that the Interested Party is not qualified to hold the office he is now occupying and prayed for the appeal to be allowed with costs.

Respondents Case

5. Mr. Kioko Advocate, relied on the Replying Affidavit sworn by the Respondent to oppose the appeal. He submitted that the Respondent invited the members of the KPOWU National Executive Committee to her office on 19.1.2018 in compliance with the Court order dated 20.12.2017. The first agenda of the meeting was to elect a Ag. General Secretary pending election of the substantive General Secretary of the

union. The second agenda was election of the substantive General Secretary.

6. Mr. Kioko contended that, during the meeting the NEC members did elect the Ag. General Secretary through secret ballot without any complaint or objection on the issue of eligibility. It is only after the Interested Party won that the second Appellant refused to sign the results. He maintained that the Interested Party has always been elected as an official of the union without any issue of eligibility being raised.

7. Mr. Kioko further submitted that the appellants have not invoked the right mechanism under the union's constitution for the removal of an officer from office. He observed that the first Appellant was not in the meeting that elected the Ag. General Secretary on 19.1.2018 and contended that he cannot depose on things he did not witness. He concluded by advising the appellant, that if they were interested in the position of General Secretary of KPOWU they should offer themselves as candidates on 9.3.2018 and stop frustrating the interested party in Court. He prayed for the appeal to be dismissed with costs.

Interested Party's Case

8. The Interested party appeared in person. He contended that the Respondent herein was directed by the Court to determine the person to act as the KPOWU General Secretary pending the election of the substantive General Secretary. The said court order was occasioned by the fraudulent election of a stranger to act as the General Secretary. He submitted that he was eligible for election to act as General Secretary because he was elected Branch official since 2004 and served as full time Branch Secretary. He contended that as a full time officer of the union he was not required to pay subscription fees. He further contended that the position of General Secretary does not require membership. He cited rule 12(3) of the union's constitution, which provides that for a person to be eligible to hold the office of general Secretary, he must have severed for 10 years in the industry. He maintained that he has served 14 years in the industry by virtue of having worked for a petrol station in 2002 and 2003 and thereafter employed by the union in the oil industry to date.

9. Without citing any reasons, the interested party submitted that the precedents cited by the appellants are distinguishable from the facts of this appeal. He concluded by contending that he is targeted by appellants because he is the best candidate for the General Secretary of the union but nevertheless welcomed any person to compete in the election which is scheduled to take place on 9.3.2018.

Appellants' Rejoinder

10. Mr. Wambola submitted that no evidence was adduced to counter the eligibility issue of the Interested Party to act in the office of General Secretary for KPOWU. He further submitted that it is incorrect to allege that the union officials do not pay subscription to the union and clarified that the 2nd Appellant, a Deputy General Secretary like the Interested party has been paying union dues monthly. He concluded by maintaining that the appellants have brought this appeal, not as officials of the union, but as members of the union who have a right to determine who becomes their General Secretary. He prayed for the appeal to be allowed with costs.

Analysis and Determination

11. There is no dispute that on 20.12.2017 the Court made an order in **ELRCC 2429 of 2017** referring the dispute to the Registrar of Trade Unions to resolve the issue of Ag. General Secretary of KPOWU and to supervise election of the substantive National General Secretary of the union within 3 months. There is also no dispute that in compliance with the said order the Registrar convened a meeting of the union's NEC on 19.1.2018 first to elect an Ag. General Secretary of the Union and secondly to deliberate on the election of the substantive National General Secretary.

12. There is also no dispute that on the said date the second Appellant and the Interested Party, both Deputy General Secretaries, offered themselves for the position and secret ballot was done through which, the interested party was duly elected but the second Appellant declined to sign the results. It is further common knowledge that thereafter the NEC requested, and the Registrar effected the change of officers and communicated the same to the union on 22.1.2018.

13. The issue for determination is whether the Registrar erred in law and facts and disregarded the law, evidence and the constitution of KPOWU in registering the Interested Party as the Ag. General Secretary of the Union.

Disregarded evidence, Law and provisions of KPOWU Constitution

14. The appellants have contended that the Respondent herein disregarded evidence, law and the union's constitution and proceeded to register the Interested Party as the Ag. General Secretary for the Union. After careful consideration of all the material presented to me by the Appellants, I understand them to be saying that the Registrar erred by registering an unqualified person to act as the National General Secretary for KPOWU. In other words, the appellants seem to say that the Registrar acted contrary to the consent Court order dated 20.12.2017 in **ELRCC 2429 of 2017** which required her to assist the Union to select Ag. General Secretary from the two deputies in accordance with the union's constitution.

15. The said Court order partly stated as follows:

"IT IS HEREBY ORDERED BY CONSENT

1. THAT this dispute is referred to the Registrar of Trade Unions to assist the parties to resolve the issues of who becomes the acting National General Secretary between the two deputies, in accordance with the Union's constitution and to supervise substantive elections of National General Secretary within 3 months."

16. In compliance with the said order, the Respondent convened a meeting of the KPOWU NEC in her office where at the NEC members

agreed to conduct secret ballot to elect Ag. General Secretary from the two deputies namely the second Appellant and the Interested Party. In the end, the latter won the election but the former declined to sign the results contending that he will first consult unspecified person or persons. He never raised the eligibility issue to the NEC or the Registrar, either before or after the election of the Interested Party. The question that arises is, what error of law or facts did the Registrar make in registering the Interested Party as the Ag. General Secretary?

17. In my opinion, the Appellant have failed to demonstrate that they raised objection to the participation of the Interested Party in the election on ground of his ineligibility but both the NEC who elected him and the Registrar who was supervising the election disregarded the objection. They have also failed to prove that they protested against registration of the interested party as the Ag. General Secretary and referred the Registrar to the provisions of the KPOWU constitution on eligibility of a person to hold the office of the National General Secretary of the Union, which Mr. Wambola eloquently submitted on before me, but the Registrar disregarded.

18. This being an appeal, I am only required to review the decision appealed from based on the evidence and submissions made before the Registrar and not to consider extraneous and new matters. The impugned decision is that of registration of the Interested Party as Ag. General Secretary. In my view, the Registrar had no choice but to perform that statutory duty of registering the results of election of the new Ag. General Secretary. She is not the one who decided that the interested party be the Ag. General Secretary but the NEC of the union. All what she did was her statutory duty under section 35(2) of the Labour Relations Act of registering a duly elected officer.

19. The election was lawful and duly authorized by the parties through a consent court order following the death of the former National General Secretary and were conducted under the provisions of clause

9.16 of KPOWU constitution, which states as follows:

“Any vacancy occurring in the membership of the National Executive Council, in the event of death before the next Annual Delegates Conference, the National Executive Council shall fill the vacancy by appointing and confirming a person from among the members of the union.”

20. As earlier observed, the Registrar was not served with any protest from any quota challenging the eligibility of the Interested Party. She was therefore never invited by the parties to make any decision whether or not to register the interested party as the Ag. General Secretary. There is therefore no error in judgment that was committed by the registrar when she registered the change of officers of the KPOWU and communicated the same on 22.1.2018.

21. The appellants having failed to prove that the matters being raised in this appeal were raised to the registrar, before and after the election of the interested party, but she disregarded them and proceeded to register him as the Ag. General Secretary, I find and Hold that the appeal is bereft of merits.

Disposition

22. For the foregoing reason, the appeal is dismissed with costs.

Dated Signed and Delivered in Open Court at Nairobi This 7th day of March, 2018

ONESMUS MAKAU

JUDGE