



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**APPEAL NO. 3 OF 2018**

**GEORGE OKOTH.....APPELLANT/APPLICANT**

**VERSUS**

**THE REGISTRAR OF TRADE UNIONS.....RESPONDENT**

**AND**

**KENYA PETROLEUM AND OIL**

**WORKERS UNION.....1ST INTERESTED PARTY**

**RAPHAEL OUMA OLALA.....2ND INTERESTED PARTY**

**RULING**

**Introduction**

1. The Appellant brought this appeal seeking the following orders:

- (a) His removal from the position of Acting General Secretary of first interested party be revoked and he be reinstated.
- (b) The Respondent be compelled to reinstate him to the position of Acting General Secretary of the first Interested Party
- (c) Permanent injunction to restrain the respondent and the second Interested Party from removing him from the position of the Acting General Secretary.
- (d) Costs of the appeal to be born by the respondent and the second Interested Party.

2. The appeal was filed simultaneously with a Notice of motion dated 19.2.2018 which basically sought the orders in the appeal on the interim basis. However before the appeal and the motion could be heard, the first and the second Interested Party brought the Notice of Motion dated 25.5.2018 seeking for the appeal and the appellants motion to be dismissed with costs. The motion is supported by the affidavit sworn by the second Interested Party on his own behalf and that of the first interested party.

3. The motion is not opposed by the Respondent but the appellant has filed grounds of opposition on points of law filed on 4.6.2018. The motion was disposed of by written submissions filed by all the parties.

**Applicant's Case**

4. The applicants submitted that the position of Acting General Secretary of the first Interested Parties is no longer in existence because the union has since elected the second Interested Party as the substantive General Secretary of the union. According to the applicants, the Appellant's appeal and motion are overtaken by events and should be dismissed. They further urged that the orders sought by the appellant are not tenable and cannot be executed even if they were granted.

**Respondent's Case**

5. The respondent has supported the Interested Parties application on ground that the appeal is non justiciable. In her view, there is nothing in

the appeal that requires adjudication by the Court. She contended that the first Interested Party elected the second Interested Party as her General Secretary on 9.3.2018 in compliance with court order in ELRC No. 2429 of 2017 issued on 20.12.2017 and as such, the present appeal has been rendered moot and prayed for the same to be dismissed.

### **Appellant's Case**

6. The appellant has urged that the application is incurably defective. bad in law, lacking in merit, incompetent, frivolous, vexations, and otherwise and abuse of Court process. It is further appellant's view that the application has been brought with unclean hands. He has urged that section 12 of the Employment and Labour Relations Court Act under which the application is brought is repealed while section 28 of the Employment and Labour Relations Court Act has nothing to do with dismissal of the appeal. He further contended that the second Interested Party was never qualified for appointment in the position of Acting as well as substantive General Secretary and as such his appointment was null and void.

7. He submitted that he was entitle to be heard on his appeal under Article 50 of the constitution. He relied on Court of Appeal decision in *Yaya Towers Limited Vs Trade Bank Limited (in Liquidation)* among others to urge that striking out pleading is draconian and that parties should be given fair and reasonable opportunity to present its case. He concluded by urging the court should uphold Article 159(2) (d) of the constitution by declining to dismiss the appeal on a technicality.

### **Analysis and Determination**

8. After careful consideration of all the material presented to me, the main issue for determination is whether the appeal and the appellant's motion dated 19.2.2018 are overtaken by events and that they should therefore be dismissed. The applicants and the respondent have deponed on factual matters which have not been contested by affidavit on the part of the appellant. It is therefore not disputed that on 9.3.2018, the union elected the second Interested Party as her substantive General Secretary and as such the position of Acting General Secretary was rendered non existent. In view of the fact that the position of the General Secretary of the union has since been filled by a duly elected officer, it is obvious that the appeal herein is now overtaken by events.

9. Under the dogma of justifiability, the court is supposed to desist from entertaining hypothetical, academic interest cases or abstract arguments. Black's Law Dictionary defines justiciability as a matter that is proper to be examined by the Court or a question that may properly come before a tribunal for a decision. In this case, the appeal seeks to reinstate the appellant to the position of Acting General Secretary and to restrain the respondent and the second Interested Party from removing him from the said office of Acting General Secretary.

10. Even if the Court was to sustain the appeal and enter judgment in favour of the appellant, the judgment would be in vain because, the position of Acting General Secretary is no longer in existence and secondly, the decision to elect the Substantive General Secretary is by the first Interested Party against whom no injunction order has been sought by the appeal. Consequently, I agree with the applicants and the respondent that the appeal and the motion dated 19.12.2017 are overtaken by events.

11. The objection that the application herein is brought under wrong provisions of the law is dismissed because failure to cite the correct provision is not fatal. In addition, I have considered the cited judicial precedents and found them not relevant to the case herein.

### **Conclusion and Disposition**

12. For the reasons that the Appeal herein is no longer justiciable, I dismiss together with the notice of motion dated 19.12.2017. Each party to bear his own costs for the appeal and the applications.

**Dated, Signed and Delivered in Open Court at Nairobi this 17th day of August, 2018**

**ONESMUS N. MAKAU**

**JUDGE**