



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 157 OF 2017

BETWEEN

1. CLAY ODARI
2. PETER KATIBI
3. GODFREY KAIMENYI CLAIMANTS

VERSUS

1. KENYA PETROLEUM OIL WORKERS UNION
2. KENYA PETROLEUM OIL WORKERS UNION COAST BRANCH
3. THE REGISTRAR OF TRADE UNIONS
4. PHILLIP FONDO KARISA
5. ISSACK YAKUB
6. RAPHAEL OUMA OLALA
7. MARY BENGAT CHERONO
8. WALTER MALENYA ISINDU
9. DAVID J. OCHUSA RESPONDENTS

RULING

1. The 2nd Respondent scheduled its Annual General Meeting for 13th February 2016. Branch Elections were to take place on this date. The Court granted interim orders stopping the elections, upon an Application made by the 1st Claimant, and 2 other Members of the 1st Respondent, Jones Mbovyo and Tom Muchina. Proceedings were under Cause Number 93 of 2016. Parties were heard *inter partes* on the basis of Written Submissions, and Ruling delivered on 4th March 2016, directing Kenya Petroleum Workers Union, its Coast Branch, and 3 Branch Officials, to avail the Coast Branch Union Members' Register to the Claimants for verification, before elections were conducted.

2. The Claimants state there was no compliance on the part of the Respondents, with the Ruling dated 4th March 2016. The 2nd Respondent went on to hold its elections on 20th August 2016. The 3rd Respondent registered 4th to 9th Respondents as Officials of the 2nd Respondent.

3. On 2nd March 2017, the Claimants filed this Claim asking the Court to give the following Judgment against the Respondents:-

- a) An order of specific performance for the Ruling dated and delivered on 4th March 2016 in Cause Number 93 of 2016.
- b) A declaration that registration of 4th to 9th Respondents as Officials of the 2nd Respondent is illegal and/or un-procedural.

- c) An order for specific performance of deregistration of the 4th to 9th Respondents as Officials of the 2nd Respondent.
- d) An order barring the 2nd Respondent from recruiting Members for purposes of elections.
- e) Costs of the Claim.
- f) Any other relief the Court deems fit to grant.

4. The Claimants filed at the same time as the Statement of Claim, an Application by way of Notice of Motion, supported by the an Affidavit sworn by the 1st Claimant. They pray that the 4th to 9th Respondents are barred from acting as Officials of the 2nd Respondent, pending hearing and determination of the Claim.

5. The 6th Respondent swore and filed a Replying Affidavit on behalf of the other Respondents, except 3rd and 9th Respondent. Respondents' position is that they complied with the order made in the earlier Cause. Elections took place on 20th August 2016. Form Q was forwarded to the 3rd Respondent and registration of Officials effected. The Officials are as reflected in the extract from the 3rd Respondent issued on 24th August 2016. The extract does not include the name of the 9th Respondent.

6. The Registrar filed a Statement of Response on 23rd March 2017. There is a general denial that the Registrar registered the Officials of the 2nd Respondent illegally and un-procedurally. Form Q was presented to the Registrar after the 2nd Respondent held its elections. It's the position of the Registrar that the Claim contravenes Section 30 of the Labour Relations Act No 14 of 2007.

7. The Respondents [excluding 3rd and 9th Respondents], filed an Application dated 9th March 2017, asking the Court to discharge interim orders made in favour of the Claimants on 2nd March 2017; and that the Application and the Claim filed by the Claimants are dismissed in their entirety. The Application is opposed through a Replying Affidavit sworn by the 1st Claimant, filed on 24th March 2017.

8. The two Applications were heard on 30th July 2018.

The Court Finds:-

9. Interim order granted in favour of the Claimants on 2nd March 2017, was that:-

‘An injunction is granted restraining the 4th to 9th Respondents, their agents and or servants, from acting as Officials of the Kenya Petroleum Oil Workers Union Coast Branch, pending hearing and determination of the Application.’

10. On 24th March 2017, in the presence of Parties' Representatives, the Court ordered that:-

‘... interim order given to the Claimants on 2nd March 2017 is not extended.’

11. Prayer Number 2 in the Application filed by the Respondents [excluding 3rd and 9th Respondent], seeking to have the Interim Order discharged and/or varied, was therefore overtaken by non-extension of the order, recorded on 24th March 2017.

12. The only issue which remains to be determined in this Application is prayer number 3, which is that the Claimants' Application and Claim are dismissed in their totality.

13. The 2nd Respondent held its elections on 20th August 2016. 4th to 8th Respondents were registered as Officials as shown in the extract from the 3rd Respondent, reflecting registration as from 24th August 2016. The 1st Claimant and two other Members who are not Parties to this Claim, had through Cause Number 93 of 2016, sought to be availed Register of Members, Coast Branch for verification, before elections could be held.

14. They allege they were not availed the Register. The Respondents allege the Claimants were availed the Register.

15. The Court's view is that in issue, is whether the Respondents complied, or did not comply with an order of the Court. This issue is to be resolved through enforcement proceedings in the file in which the order was issued, not through a fresh Claim. The Claimants could pursue contempt proceedings against the Respondents under Cause Number 93 of 2016.

16. Essentially, the Claimants, go beyond alleging there was disobedience of an order made by the Court. They are challenging the process and result of the elections held on 20th August 2016. They challenge the decision by the 3rd Respondent, to endorse the results through registration of form Q. They seek reversal of the electoral process and results. They are asking the Court to order removal from Office, of elected Trade Union Officials.

17. Section 30 of the Labour Relations Act Number 14 of 2007, states that:-

‘ Any Person aggrieved by a decision of the Registrar, made under this Act, may appeal to the Industrial Court [Employment and

Labour Relations Court] against that decision within 30 days of the decision.’’

18. Election of Trade Union Officials as submitted by the Claimants is governed by Section 34 of the Labour Relations Act. Section 34 [4] stipulates that disputes arising from, or connected directly or indirectly to, elections held under this Section may be referred to the Industrial Court.

19. The Claimants argue they are not limited by Section 30 of the Labour Relations Act, as their Claim is made under Section 34 of the Act. The Respondents submit the Claim is bad in law, as what is sought by the Respondents is to appeal the decision of the Registrar. The Claimants are barred from doing so, after 30 days have lapsed, from the date the Registrar makes her decision.

20. Section 30 of the Act refers to decisions made by the Registrar under the Act as a whole, rather than under specific Sections. Such decisions are part of circumstances contemplated by Section 34 of the Act. At the heart of the dispute is the electoral process conducted by the 2nd Respondent, and change registered by the 3rd Respondent. These are matters arising from or connected to elections held by the 2nd Respondent. They involve a decision made by the Registrar. The dispute may be referred to the Industrial Court, only in the form of an Appeal, under Section 30 of the Act. Section 34, must be read together with Section 30. Otherwise Section 30, which allows Persons aggrieved by decisions of the Registrar made under the Act as a whole, to prefer Appeal against such decisions within 30 days of the decisions being made, would not make sense. Notice of Change of Officials is submitted to the Registrar in form Q, under Section 35 of the Labour Relations Act. The Registrar is required to consider various issues under Subsections [3], [4] and [5], before making her decision on registration. Once a decision is made, it becomes appealable under Section 30 of the Act. It is no longer an internal electoral dispute involving the Union, its Members and aspiring Officials, which can be dealt with under Section 34, by direct engagement of the Court through a Claim; it must be brought as an Appeal against the decision of the Registrar, under Section 30.

21. If there is no decision made by the Registrar, the Claimants could file a direct challenge to the electoral process, as they did in Cause Number 93 of 2016. In other words, a distinction must be made between disputes implicating the decision of the Registrar, and disputes involving Trade Unions' elections without the intervention of the Registrar. The Claimants were within their right to approach the Court directly in Cause Number 93 of 2016, since they were not challenging any decision taken by the Registrar. Section 34 allowed them direct access to the Court. Once the electoral process was completed with the registration of results by the Registrar, the only access to the Court would be, in the respectful view of the Court, through Section 30 as read together with Section 34. An Appeal, rather than a Claim, ought to have been filed, seeking reversal of the electoral process and registration of Officials.

22. The Claimants have throughout failed to explain to the Court what the 9th Respondent is, in the 2nd Respondent. His name is not captured anywhere in the extract from the 3rd Respondent. He did not participate in the proceedings. He does not seem to have been served with the Court summons. It is not at all clear in what capacity the 9th Respondent has been brought before the Court. It is not disclosed who or what he is.

23. The Court is satisfied that:-

- a) *The Claimants seek to challenge the electoral process as well as registration of Officials made by the Registrar.*
- b) *The only route, in challenging a decision of the Registrar at this Court, made pursuant to any provision of the Labour Relations Act, is through an Appeal under Section 30 of the Act.*
- c) *Section 34 would grant Claimants direct access to the Court in disputes which do not involve decisions of the Registrar, such as related to Cause Number 93 of 2016 filed by the 1st Claimant with other Members of the 2nd Respondent. These are mainly electoral disputes arising before registration of form Q.*
- d) *The 9th Respondent is a total stranger whose details have not been disclosed to the Court.*
- e) *The Ruling of the Court, and Orders made thereto, in Cause Number 93 of 2016, should have been enforced under that Cause, rather than through a fresh Claim. The Respondents did not explain why they opted to institute fresh proceedings, rather than seek enforcement in Cause Number 93 of 2016.*

24. Consequently, the Court makes the following Orders:-

- a) *The Application filed by the Claimants on 2nd March 2017 is rejected.*
- b) *Prayer Number 3 of the Respondents' Application filed on 9th March 2017, seeking dismissal of the entire Claim is allowed.*
- c) *There shall be no order on the costs.*
- d) *The file shall be marked as closed.*

Dated and delivered at Mombasa this 26th day of October, 2018

James Rika

Judge