



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE 67 OF 2016

STEPHEN OUMA JUMA1ST CLAIMANT

CALEB WERE2ND CLAIMANT

PHILIP MUSYOKI3RD CLAIMANT

VERSUS

REGISTRAR OF TRADE UNIONS1ST RESPONDENT

KENYA ELECTRICAL TRADE & ALLIED

WORKERS' UNION2ND RESPONDENT

MOSES MOKUA3RD RESPONDENT

RULING

The applicant's by a motion dated 22nd Janaury, 2016 sought orders that;

- a. That, the Honourable Court be pleased to issue an interim injunction restraining the 1st respodnent from effecting and or registering as new officials the results and or returns of the 2nd respondent's Central Nairobi Branch elections held on 9th day of January, 2016 pending the hearing and determination of this application.
- b. That, the Honorable Court be pleased to issue an injunction restraining the 1st respondent from effecting and or registering as new officials the results an or returns of the 2nd respondent's Central Nairobi Branch elections held on 9th day of January, 2016 pending the hearing and determination of this suit.
- c. That, this Honourable court be pleased to issue an order cancelling and nullifying the purported elections carried by the 2nd respondent in respect to Nairobi Central Branch on the 9th January, 2016 and allow fresh elections be conducted.
- d. That, this Honourable court be pleased to issue an order cancelling and nullifying the purported elections carried by the 2nd respondent in respect to Nairobi Central Branch on the 9th January, 2016 and allow fresh elections be conducted.

e. That, the 3rd respondent herein be restrained from acting or assuming the office as an official of the 2nd respondent specifically Nairobi Central Branch until a fresh election is conducted.

2. The application was supported by the affidavit of Stephen Juma who deponed on the main that;

a. That, on 19th December, 2015 the Branch Secretary to our branch to wit KETAWU Nairobi Central Branch did issue notice in respect to the General Meeting to be held on the 9th January, 2016.

b. That, on the 9th January, 2016 it was anticipated that the members were to be verified as per the current register for the Employees of Kenya Power and other organizations within the specified region. Unfortunately, on that day the register in use did not reflect the current employees resulting to permitting retired, dismissed and former employees to vote.

c. That, the Nairobi Central Branch elections was not free and fair as aspirants were allowed to campaign, bribe voters and import voters who did not belong to the branch. As a result the number of votes viz a viz the attendants varied greatly which discrepancy calls for nullification of the results.

d. That, the KETAWU Constitution Act 17(1) was not followed, there was no secret ballot and there was utter disregard of the procedures and therefore pray for nullification of the results of the elections carried on by the 2nd respondent on 9th January, 2016 and a repeat and or fresh election be called as per the law.

3. The 3rd respondent opposed the application and filed a replying affidavit in which he deponed on the main that:

a. That on 19th December, 2015 the Branch Secretary to our branch with KETAWU Nairobi Central branch did issue notice in respect to branch general meeting to be held on 9th January, 2016.

b. That the elections held on the 9th day of January 2016 were as per the Kenya Electrical Trade & Allied Workers' Union constitution, rules and regulations.

c. That on 8th day of January a day before the elections, the current register was verified by the claimants in front of the Labour Commissioner at his Nyayo House offices.

d. That on the said day (8th January, 2016), before the Labour Commissioner, they were satisfied as to the contents of the register and raised no objections whatsoever. Furthermore, they gave a list of demands that they insisted be complied with in order to ensure the said elections would be transparent.

e. That among the list of demands was the perusal of the register, transparent and sealed ballot boxes be availed and brought to the venue of the election, of which all were complied with.

f. That on the said day of elections there is a record of the number of attendees as annexed herein which clearly can demarcate the number of votes cast is in line with the number of the electorate who attended the election. Thus there's no discrepancy on the number of votes cast *vis a vis* the actual attendance register.

4. In his submissions in support of the application Mr. Ongicho for the claimant submitted that the 3rd respondent having vied for the position of Chairman of the 2nd respondent and having been elected as such, lacks the moral base to justify his election in the absence of any returns or results from the 2nd respondent.

5. According to counsel if the purported elections results of 9th June, 2016 are not nullified, the claimants and other members will suffer irreparable loss or damage of having leaders elected through a flawed process. The 3rd respondent on its part submitted that the claimants ascertained the thoroughness of the register and were satisfied. Further that the 1st claimant presented himself and contested in the election which showed he had faith in the preparations and conduct of the voting process. According to counsel, it is only that the claimant lost that he sought discredit the whole process.

6. This is an interlocutory application and all the court needs to consider is whether the applicant has a prima facie case with probability of success and further in a case such as this one, where balance of convenience lies. The House of Lords, per Lord Diplock in the case of **American Cyanamid vs Ethicon** observed as follows; “the object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff’s need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff’s undertaking in damages if the uncertainty were resolved in the defendant’s favour at the trial. The court must weigh one need against another and determine where the balance of convenience lies”

7. The issue before the court concerns contestation over union leadership. The applicants contend that the 3rd respondent assumed office through a flawed process hence the 1st respondent should be interdicted by the court from registering him as a duly elected official of the 2nd respondent. The basis of this contention lies on contested facts such as the accuracy of the voters register, voter bribery and importation of voters among others.

8. Faced with the foregoing, the court has to decide the appropriate order to make pending the hearing and determination of the main claim. That is to say, would it be more convenient to gag the 3rd respondent and other officials elected through the alleged flawed process carrying out the affairs of the 2nd respondent pending the determination of the suit or would it be more convenient to allow the affairs of the 2nd respondent to be conducted by the contested officials pending the determination of the main claim.

9. Borrowing from practice in presidential and parliamentary elections the mere fact that a person has petitioned an election over an election of a person, does not prevent such person from discharging the affairs of the office they are elected in. This practice is informed by the principle of representation and that there ought not to be power vacuum especially where such positions are representative such as members of parliament, president and indeed union officials.

10. That having been said, the court is of the view that the balance of convenience lies in keeping the officials elected in office on 9th January, 2016 pending the hearing and determination of the main claim. Since the facts upon which the claimants seek to nullify their election are contested, the truth or otherwise of the same can only be known after a full hearing on merit.

11. The application for interlocutory injunction therefore fails but the court hereby orders that the main claim be prepared and set for hearing on priority bases.

12. It is so ordered.

Dated at Nairobi this 3rd day of March, 2017

Abuodha J. N.

Judge

Delivered this 3rd day of March, 2017

Abuodha J. N.

Judge

In the presence of:-

.....for the Claimant

.....for the Respondent.

Abuodha J. N.

Judge