



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 954 OF 2016

(Formerly J. R. MISC. Application 11 of 2016

which was formerly HCCC J. R. No. 153 of 2016)

DR. FRANKLIN KABURU KNOTI

DR. JOEL IMBISI

DR. WINNIE MUTUKU

DR. GATHUA CLAIMANTS

VERSUS

REGISTRAR OF TRADE UNIONS.....1ST RESPONDENT

COMMISSIONER OF LABOUR.....2ND RESPONDENT

UNIVERSITIES ACADEMIC STAFF

UNION (UASU).....INTERESTED PARTY

Mr. P. K. Njoroge for claimants

M/s Shitubi for respondent

JUDGMENT

1. Serving before court is a memorandum of claim dated 23rd May 2016 seeking the following orders: -

- a) An order for an injunction to issue directed at the officials of the interested party now in office to restrain the officials purportedly elected on 23rd day of March 2016 not to perform functions in the name of the interested party until further orders of this Court.
- b) An order for a declaration that Universities Academic Staff Union (UASU) elections, Kenyatta University Chapter conducted on 23rd March 2016 are null and void.
- c) An order that the elections of officials of UASU Kenyatta University Chapter were conducted in total violation of the legislation or statute that creates UASU and in total disregard to guidelines provided therein.
- d) An order directing a repeat election and a directive that two registers be provided for inspection both by the candidates, their agents and the voters to wit:
 - (i) Fully paid up members register
 - (ii) Agency payers register that is maintained by the employer with the details of deductions, deposits and updates when

their conditional/temporary membership ceased.

- e) An order directing the production of all documents and information regarding the credible union elections for the inspection by participants in the election.
- f) An order directing the withdrawal of the letter purportedly to be a notice by the presiding officer that waived the legally recognized preconditions for participation in an election abide unceremoniously.
- g) An order that the officials purportedly elected on 23rd March 2016 disclose their affairs and actions that they have undertaken since they took office.
- h) An order that the respondents do bear the costs of these proceedings.

2. For the record, and by consent of the parties HCCC J. R. 153 of 2016 which became J. R. No. 11 of 2016 was withdrawn with costs to the interested party. Similarly, interested party's application and preliminary objection dated 27th May 2016, the preliminary objection by the 1st and 2nd respondents dated 11th July 2016 were withdrawn with no order as to costs.

3. It was then agreed that the claim dated 23rd May 2016 be disposed of by way of written submissions. The interested party and the respondents were to file a response to the memorandum of claim dated 23rd May 2016 within 7 days. The claimant at liberty to file a further affidavit with written submissions within 14 days of service and the interested party and respondent to file written submissions within 14 days upon service.

4. For the avoidance of doubt, what is pending before court is not an application but a substantive suit vide the memorandum of claim dated 23rd May 2016 and filed on 24th May 2016.

5. It is supported by a verifying affidavit of Dr. Franklin Kinoti, the 1st claimant.

6. The suit was filed simultaneously with a chamber summons application seeking interim orders pending the hearing and determination of the claim. The application was considered by Justice Ndolo in the first instance and no interim orders were granted.

Facts of the Case

7. The claimants are described in the memorandum of claim as adults of sound mind and no further personal particulars or official status of the claimants is disclosed in the memorandum of claim.

8. The 1st respondent is The Registrar of Trade Unions whereas the 2nd respondent is The Commissioner of Labour. The interested party is the Universities Academic Staff Union (UASU).

9. The claim impugnes and seeks for orders to nullify the outcome of the elections of the office holder of the interested party held on 23rd March 2016 on the grounds set out at paragraph 8 of the memorandum of claim as follows;

- a) The presiding officer of trade unions allowed non-fully paid up members to participate in nominating candidates.
- b) The presiding officer allowed agency payers/contributors to participate in the elections whereas their registration should be in a separated register of non-members.
- c) The presiding officer allowed the elections to proceed in the absence of a register of fully paid members.
- e) The presiding officer allowed members who had only showed interest in joining the union as members to vote which is a clear violation of the constitution.
- e) The returning officer failed to apply due diligence when he amended the requirements or prerequisites preceding a credible election by stating in a letter that only a membership card was required thereby disregarding the issue of whether the voter was qualified to vote by virtue of failing to pay monthly subscription and he ignored the fact that even if the member has signed a form the joining fee of Kshs.500/= was not an option for fully paid up members.
- f) The presiding officer failed to demand or he may have demanded and his request for a register of agency payers was denied and he continued to conduct or oversee the elections proceed thereby again creating the unshakable fear that majority or almost all the over 500 persons who participated in the elections could have been all agency payers who we reiterate that the constitution gives them cognizance as non-members.
- g) Had registrar conducted himself with decorum he would have unearthed the problem and discovered the violations.
- h) The requirement that all the delegates who participate in the elections leading to the participation in the national elections should also be subjected to an election was a fundamental requirement which was also openly abused and this led to handpicking of delegates contrary to the rules, a gross and open breach and abuse of power and the claimants aver that to the best of their knowledge

among the now so called delegates except one are holding office illegally and contrary to the guidelines.

i) The national executive council's participation was thrown through the window because that office did not approve the appointment of the returning officer.

j) The nomination of candidates was done by a few unknown and non-fully paid members leading to a flawed election.

k) There is an apparent danger that the elections were hurried in order to allow non-fully paid members to assume office and this was to pave way for the imagined negotiation of a Collective Bargaining Agreement and open the window of financial impropriety given that in accordance with the gazette directions, the Minister in charge of Labour Ministry, then Honourable Mr. John Munyes directed Kenyatta University UASU Chapter to deduct union dues and deposit the same into a designated account whose reference was given by him and held at the Barclays Bank of Kenya Moi Avenue Branch and to this the claimants on behalf of genuine union members read mischief in the diversion of union funds.

i) The Registrar of Trade Unions in consultation or collusion of the 2nd respondent the Commissioner of Labour are faulted in disregarding a claim or complaint raised by the first claimant named in these proceedings regarding the election irregularities and further upon receipt of the complaint the two respondents failed to expeditiously convene a meeting in order to resolve the dispute or give a formal decision or opinion.

m) The two respondents are therefore guilty of recognizing and registering the officials purportedly elected in these elections held on 23rd March 2016 and they are guilty of violating articles and sections of both the constitution of UASU and the provisions of the Labour Relations Act No. 12 of 2007.

n) The claimants aver that the fact that those who participated in the elections were ineligible the issue was a bit confusing and they wonder if non-members of a union would be proper parties before the Employment and Labour Relations Court and in the meanderings the 1st claimant concluded that non-members of a union have no capacity to be sued in an Employment and Labour Relations Court as theirs may not be safely described as a trade union dispute and that led him to file Judicial Review application at the High Court Nairobi being J. R. No. 153 of 2016.

o) By reasons aforementioned the claimants state that they have suffered mental and psychological disturbances and that their concerns should be treated fairly and the constitutionally recognized principles enunciated in Articles 22 (1), 23 (2) (2) of the Kenyan Constitutions 2010 that provide a guide on fair hearing, natural justice and fair administrative action should be upheld.

10. The verifying affidavit in support of the averments in the memorandum of claim by Dr. Franklin Kaburu Kinoti, sworn on 23rd May 2016, is brief and he simply states that he is competent to swear the affidavit and that he had read the contents of the memorandum of claim and confirmed that its contents are true and that there was no pending suit between the parties at the time.

11. The claimants rely on annexure to the memorandum of claim marked FKK1 to FKK12. The claimant relies on these annexure in terms of the consent of the parties not to adduce oral evidence in the matter.

12. The claimants pray that the suit be allowed with costs.

Response

13. The respondents and the interested party did not file a memorandum of reply to the claim. The court has also not found any submissions filed by the parties in terms of the consent of 19th September 2016.

14. It would appear therefore that the suit is undefended. However, the claimants bear the burden of proof to show on a balance of probability that the impugned elections were not conducted in a free and fair manner and in accordance with the union constitution.

Determination

15. The issue for determination is whether the elections of UASU, Kenyatta University Chapter conducted on 23rd March were free and fair and in accordance with the union's constitution and applicable law.

16. It is alleged that the presiding officers allowed; -

(i) None fully paid members of the union to participate in the election.

(ii) Non-members who paid agency fees to participate in the elections.

(iii) Elections to proceed without a register of fully paid up members

(iv) Only use of a membership card to prove membership without ascertaining payment of monthly subscriptions and joining fees of Kshs.500/= *inter alia*

17. That therefore it cannot be ascertained whether the over 500 persons who voted were members of the union hence the exercise was

flawed, violated the union constitution and therefore null and void.

18. The Registrar of trade unions on the other hand failed in his oversight duty to detect these flaws.

19. The delegates were also handpicked and not elected in terms of the constitution. It is also alleged that the national executive council did into participate in the appointment of the returning officer.

20. Furthermore, the Registrar of Trade unions and the Commissioner of Labour ignored complaints raised by the 1st claimant regarding the aforesaid irregularities.

21. The two officials are faulted for recognizing and registering the officials who were irregularly elected on 23rd March 2016 in violation of the union constitution.

22. The claimants invoke the provisions of Articles 22 (1), 23 (1) and (2) of the Constitution of Kenya 2010 to be given a fair hearing and they be awarded the reliefs they seek herein before set out.

The Law

23. Article 14 of the Constitution and Rules and Regulations of the Universities Academics Staff Union (UASU) reads:

“(c) all candidates nominated for election to the National Executive Committee shall be fully paid up members of the union and shall be nominated by ten members exclusive of members who are themselves candidates for elections and such nominations shall be signed by the candidates seeking elections indicating his/her acceptance of nomination.

(e) All candidates seeking elections to National Executive Committee positions must be delegates from their respective Chapters and be eligible to attend and vote at the National Delegates Conference and the returning officer shall be an independent person/body identified by the National Executive Committee.”

24. It is also apposite to note the provisions of Article 4 on membership as follows: -

“(a) membership of the union shall be open to all academic and research staff of the universities appointed on Academic terms of service.

(b) Every eligible person shall be required to pay entrance fee of shillings five hundred (Kshs.500) or application of membership and

(c) The unknown subscription fee shall be collected from every member of the union at the rate of two percent (2%) of the basic wage of every member per month as decided by the National Delegate Conference.”

25. To answer the question whether or not the over 500 persons who voted were paid up and eligible members of the union, the onus as said earlier is on the claimants to prove on a balance of probability that they were not paid up members and were therefore not eligible to vote as alleged or at all.

26. This onus remains regardless whether the respondents have filed a memorandum of defence or not. The respondent only bears the onus of rebuttal once evidence tending to show that those who voted were not paid up members and were not therefore eligible to vote.

27. The memorandum of claim does not have specific averments with specific attachments with names of persons alleged to have voted and were not paid up members and therefore not eligible to vote. It is trite law that a person must stand or fall with his pleadings.

28. There is absolutely nothing in the memorandum of claim directing the court to specific evidence which shows that the elections were conducted in an irregular manner.

29. Even the Chamber Summons application that was filed simultaneously with the memorandum of claim supported by an affidavit of Dr. Franklin Kaburu Kinoti lacks any specific depositions in reference to specific documentations produced and marked as annexures under paragraph 20 of the supporting affidavit. The casual reference to this documentation under paragraph 20 does not suffice to prove the issues in dispute.

30. Section 35 (1) of the Evidence Act, CAP 80 of the laws of Kenya provides;

“In any civil proceedings where direct oral evidence of a fact would be admissible any statement made by a person in a document and tending to establish that fact shall on production of the original document be admissible as evidence of that fact if the following conditions are satisfied, that is to say –

(a)

(b) If the maker of the statement is called as a witness in the proceedings.

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead or cannot be found or is incapable of giving evidence or if his attendance cannot be procured without an amount of delay or expense which in the circumstance of the case appears to the court unreasonable.”

31. In the present case, the documentation attached to the application was not placed in any of these categories so as to be admitted without the need to call the maker and without the need to produce the originals. That notwithstanding the court has considered the list of members presented and in the court’s view the issues in dispute cannot be proved or disproved by mere placing of the lists before court.

32. The sender of the list marked ‘FKK 2 (a) Godfrey S. MSE, Deputy Vice Chancellor (Finance and Administration) wrote on 5th May 2016 as follows;

“Kindly note that this office has no capacity to disaggregate between union members and agency fees payers. It is only the union office that is able to report on the list of their registered members.”

33. This list has 1,017 unionisable members who claimants allege to be agency fees payers.

34. The claimants further produced a list of 144 persons; it states are registered in violation of Article 4 (b) of the Constitution. The document is marked “FKK 4.”

35. Furthermore, the claimants produced a list of 83 persons marked ‘FKK 5’ purportedly registered 2 weeks before the election with a scheduled election in mind violating Article 14 (i) of UASU constitution. The document does not show who authored it but was forwarded to the Ministry of Labour by the Deputy Vice Chancellor – Administration on 23rd May 2016.

36. ‘FKK 6’ is a form with allegedly seven unlawfully added delegates dated 29th March 2016. The document shows that it was authored by the Secretary General who has appended his signature on it.

37. FKK 7 (a) is a brochure alleged to show that there was only one delegate candidate for election and not six candidates as presented in a form.

38. ‘FKK 7b’ shows three candidates who were locked out of the bungled election.

39. ‘FKK 8’ is a letter by the returning officer dated 21st March 2016 stating that for one to vote, their name had to be in the membership list as at 9th March 2016 (when nominations of candidates was closed) and need to produce UASU membership card.

40. ‘FKK 9’ is a letter by the 1st claimant, Dr. Kaburu Franklin Kinoti; Deputy Secretary General, UASU Kenyatta University Chapter objecting to the results of the elections conducted on 23rd March 2016. The letter is dated 29th March 2016. The elected candidates were duly registered by the Registrar of trade unions as the elected officials.

41. The documentation before court does not illustrate at all the persons who voted on 23rd March 2016 and whether or not they were members of UASU or not.

42. Section 107 of the Evidence Act, CAP 80 reads;

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

Simply put, the person bears the burden of proof.

43. Section 108 in further elaboration of burden of proof provides;

“The burden of proof in a suit or proceedings lie on that person who would fail if no evidence at all were given on either side.”

44. Whereas Section 109 provide;

“The burden of proof as to any particular fact lie on the persons who wishes the court to believe in its existence, unless it is provided by any law that the proof of fact is on the person who wishes to give such evidence.”

45. It is the court’s considered view that even in the absence of any rebuttal by the respondents; the claimants have failed to prove any of the alleged irregularities as to justify annulment of the results of the union elections conducted on 23rd March 2016. Simply put, the claimants have failed to discharge the burden of proof placed on them in this matter to warrant the court to find in their favour.

46. Accordingly, the suit dated 23rd May 2016 is dismissed with costs to the respondents.

Dated, Signed and Delivered on this 17th Day of November 2017

MATHEWS NDERI NDUMA

JUDGE