



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 235 OF 2016

PHILIP MUTUA MISI.....1ST CLAIMANT

BRETAH NDUKU MAKUMI.....2ND CLAIMANT

VERSUS

JOSHUA KIMEU.....1ST RESPONDENT

SUSAN KYENGO.....2ND RESPONDENT

ANCENT KIMONYI KAWIZI.....3RD RESPONDENT

THE LABOUR OFFICER, MACHAKOS...4TH RESPONDENT

AND

REGISTRAR OF TRADE UNIONS.....INTERESTED PARTY

(Before Hon. Justice Byram Ongaya on Friday, 15th December, 2017)

JUDGMENT

The claimants filed the statement of claim on 19.10.2016 through C.M. King'ori & Company Advocates. The claimants prayed for judgment against the respondents jointly and severally for:

- a) A declaration that the branch elections held on 05.10.2016 and the results thereof in respect of Machakos Branch of the Union of Kenya Civil Servants were unlawful, irregular, not credible and against the constitution of the union.
- b) An order nullifying or quashing the said elections and the results thereof.
- c) In the alternative an order for scrutiny and recount of votes cast in the said elections for determination of the lawful results.
- d) Costs and interest.

The claimants' case is that there were anomalies or irregularities which rendered the elections invalid. In particular it was alleged as follows:

- a) The presiding officer totally ignored the provided register and failed to ensure verification and validity of members or voters thereby opening room for non-members to vote.
- b) Articles 4 and 5 of the trade union's constitution on eligibility and obligation of members was breached in that resolutions or the organs of the union were disregarded and candidates who never applied as directed were allowed to participate in the elections in disregard of the forwarded list of eligible and verified candidates. Further the elections were presided over by the 4th respondent and not the Independent Electoral and Boundaries Commission (IEBC) as per the resolution of 06.09.2016; and the voting date moved from 28.09.2016 to 05.10.2016.
- c) The total number of votes cast was not announced to ensure transparent tallying against each candidate's votes.
- d) Unqualified agents were recruited to campaign for some candidates on the voting floor.
- e) There were no measures to prevent double voting like through use of the indelible ink which had been provided.
- f) The elections were designed to lock out particular candidates nominated and approved by the National Executive Board.

The 1st, 2nd and 3rd respondents filed the memorandum of response on 03.04.2017 through Joseph Mwangela & Company Advocates. They prayed that the suit be dismissed with costs. It was their case that there were no irregularities, procedural improprieties, or illegalities in the elections in issue. They stated that the elections had been credible and were conducted in accordance with the law and union constitution and the claimant's case was unfounded, unsubstantiated and without merit. Further, no ineligible persons had participated in the elections.

The 4th respondent filed a response on 25.04.2017 through A.M. Njagi, State Counsel, for Attorney General. The 4th respondent prayed that the suit be dismissed with costs. It was urged that elections had been undertaken in accordance with the union constitution and the law. The alleged irregularities and illegalities were stated not to have taken place.

Parties opted that the suit be determined on the basis of the pleadings, documents and final submissions on record.

The only issue for determination in the suit is whether the claimants are entitled to the remedies as prayed for. The evidence on record is as follows:

- a) By the letter dated 06.09.2016, the union Secretary General conveyed the union's National Executive Board's resolutions that branch elections be held on 28.09.2016, the IEBC shall officiate the branch elections, the elections be conducted in accordance with the new constitution, and only subscribed members appearing in the by-products from both levels of government will be eligible to participate in the elections.
- b) There is no dispute that the elections were presided over by the 4th respondent and not the IEBC. The 4th respondent was appointed to preside at the elections on 05.10.2016 by the letter dated 03.10.2016 signed by J.A.Yidah for Labour Commissioner. The legal authority to make such appointment has not been established.
- c) There is no dispute that the elections were held on 05.10.2016 and not on 28.09.2016 as was resolved by the union's National Executive Board.
- d) It is not in dispute that the resolutions by the union's National Executive Board were to govern the branch union elections.

e) The court has considered the functions of the union's National Executive Board that it is responsible for day to day running of the union affairs, and, its decisions are binding on union officials, members and employees with right of appeal against such decisions to the union's Advisory Council. There were no such appeals against the resolutions as conveyed about the branch elections and the court returns that the resolutions were binding upon the branch officials. Thus, the court finds no merits in the respondents' submissions that the branch officials at the time, including the claimants, participated in varying the election date.

f) Section 34 of the Labour Relations Act, 2007 is clear that elections of trade union officials be conducted in accordance with the union's constitution. In that regard, the court returns that the resolutions of the union's National Executive Board and as were conveyed were final in that regard.

Accordingly, the court returns that the variation of the elections date and the presiding officer in contravention of the union's National Executive Board resolutions went to the foundation of holding credible branch elections. The same amounted to irreparable irregularity which rendered the elections unfair as the appointed date and presiding authority were incompetent and invalid. Considering that finding, the court will not make further inquire into the validity and propriety of the elections in issue as the elections and the results thereof were null and void ***ab initio***.

In conclusion judgment is hereby entered for the claimants against the respondents for:

a) The declaration that the branch elections held on 05.10.2016 and the results thereof in respect of Machakos Branch of the Union of Kenya Civil Servants were unlawful, irregular and not credible as they were against the union's constitution.

b) The elections held on 05.10.2016 in respect of Machakos Branch of the Union of Kenya Civil Servants and the results thereof are hereby quashed or nullified.

c) Each party to bear own costs of the suit.

Signed, dated and delivered in court at **Nyeri** this **Friday, 15th December, 2017.**

BYRAM ONGAYA

JUDGE