



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF
KENYA AT NAIROBI
CAUSE NUMBER 773 OF 2017

RICHARD BOSIRE.....1ST CLAIMANT
LEONIDAH KERUBO.....2ND CLAIMANT
JANE WAMBUI.....3RD CLAIMANT
FERDINAND G. MBECHÉ.....4TH CLAIMANT
MALOBA WEKESA.....5TH CLAIMANT

**(Suing as the officials and members of University Academic Staff Union,
University of Nairobi Chapter)**

VERSUS

UNIVERSITIES ACADEMIC STAFF UNION (UASU).....RESPONDENT

RULING

1. By a notice of motion dated 20th April 2017 the claimants sought orders among other that:

(a) That the respondent through the National Treasurer be directed to remit the Chapter funds it holds to the UASU, University of Nairobi Chapter amounting to Kshs.6,634,669.20/= (covering the period January – March 2017) to enable the UASU, University of Nairobi Chapter to conduct its chapter activities as required pending the hearing and determination of this application *inter-parties*.

(b) That the respondent through the National Treasurer be directed to remit the Chapter funds it holds to the UASU, University of Nairobi Chapter amounting to Kshs.6,634,669.20/= (covering the period January – March 2017) to enable the UASU, University of Nairobi Chapter to conduct its chapter activities as required pending the hearing and determination of the claim.

(c) That this Honourable Court be pleased to direct that the UASU, University of Nairobi Chapter is entitled to receive and hold 60% of the members' monthly contributions with respect to the Chapter as per the Constitution and resolutions of the respondent pending the hearing and determination of the claim.

2. The application was based on the grounds among others that: -

(a) That Article 20 (e) of the respondent's registered constitution establishes the position of Chapter Treasurer with the following clear functions and roles as regards the Chapter Funds;

1. Maintain clear records of all the funds of the Chapter.
2. Be responsible for the funds of the Chapter and shall maintain all necessary books of accounts and records.
3. Ensure that no payment is made from the Chapter Funds under his/her control unless a payment voucher has been prepared and authorized.
4. Ensure that the funds are remitted to the Union's National Treasurer every month in accordance with the provision of Rule No. 16 (a) of the Constitution.

(b) That pursuant to Regulation 2 of the Trade Union (Accounts) Regulation, the UASU, University of Nairobi Chapter duly opened and has been operating a Chapter bank Account, being the UASU UON Account to facilitate compliance with the roles of the Chapter Treasurer and ensure that the Chapter is enable and facilitate its core activities to the 1,300 strong members within its ranks and also performs the functions outlined in Article 13 of the respondent's constitutional the branch level.

(c) That in addition to the its statutory functions and pursuant to Rule 3-12 of the Trade Union (accounts) Regulation, the said UASU, University of Nairobi Chapter, through tis Chapter Treasurer has since its creation by the respondent has been receiving trade union deductions and agency fees from its primary employer (University of Nairobi) and remitting the same to the National Treasurer of the respondent, which function is also pursuant to Article 20 (e) of the respondent's constitution.

(d) That in line with its primary obligation of ensuring that the Chapter receives the funds necessary for carrying out its activities, the respondent on the 22nd National Delegates Conference (which is the supreme authority of the respondent) which was held on 13th June 2014 effectively passed a unanimous resolution as follows:

“The ration of sharing between national office and the Chapter offices be rained at 50% to the National office and 60% to the chapters.”

(e) That the respondent has without any consultations with the chapters at all, proceeded to cause to be published in a Gazette Notice No. 38 directing the employers including the University of Nairobi to cause to be paid to a designated national union account all the trade union dues.

(f) That the respondent further proceeded to write directly to the University of Nairobi to remit 100% of the members trade union dues and agency fees directly into the said designated account the effect of which is to prevent the chapters especially the University of Nairobi Chapter from collecting the dues as per that provisions of the Trade Union (Accounts) Regulation and it is also important to state that the withholding and remission directly to the national office commenced in December 2016, way before even the notification and service of the Gazette Notice.

(g) That since January 2017, the respondent has refused to remit the Chapter Funds to the chapter at all and the amount due and payable to the University of Nairobi chapter as at March 2017 amounts to Kshs.6,634,669.20/=, which sum the Chapter, requires in order to carry out its functions effectively.

(h) That the effect of such a Gazette Notice couple with refusal to remit any funds to the Chapter is to ensure that the Chapter does not have funds at all and cripple their entire operations and

obligations to the 1,300 strong members of the University of Nairobi while the national office appropriates to itself the entire contribution from the very Chapter members.

(i) That the membership of the union in the University of Nairobi Chapter have legitimate expectations that the union through its branch leadership will at all times be ready to address their interests and without effective representation, the union members who contribute to the union stands to suffer a detriment.

3. The application was further supported by the affidavit of Dr. Richard Bosire who deponed among others that:

(a) That pursuant to Regulation 12 of the Trade Union (Accounts) Regulation, the UASU, University of Nairobi Chapter duly open and has been operating a Chapter Bank Account to facilitate compliance with the roles of the Chapter Treasurer and ensure that the Chapter is enabled and facilitate its core activities to the 1,300 strong members within its ranks and also performs the functions outlined in Article 13 of the respondent's constitution at the branch level.

(b) That in line with its primary obligation of ensuring that the Chapter receives the funds necessary for carrying out its activities, the respondent on the 22nd National Delegates Conference (which is the supreme authority of the respondent) which was held on 13th June 2014 effectively passed a unanimous resolution as follows:

“The ratio of sharing between national office and the chapter offices be retained at 40% to the national office and 60% to the Chapters.”

(c) That the system has operated without any fuss from the year 2003 to January 2017 and the respondent has agreed and respected such arrangements only to run against it with greater prejudice to the Chapter members.

(d) That to demonstrate the above fact, instances arise where the respondent seeks to directly borrow funds from the chapter and one instance was on 5th September 2016, the respondent's national office directly wrote to the chapter requesting financial assistance to pay their office rent and the request is brought herein to indicate their clear recognition of the sharing ratio and relevant part read as follows:

“...We therefore request your assistance in paying rent for two quarters: July – September and October – December which amounts to Kshs.645,192.00/=. This amount should be deducted from the 40% subscriptions that you send to the national office.”

4. The respondent opposed the application and filed a replying affidavit through one Dr. Constantine Wasonga who deponed on the matter :

(a) That he was the respondent's Secretary General and hence competent to swear the affidavit.

(b) That the claimants though purporting to sue as officials of the Chapter, have no legal standing on their own to file a suit. All the Chapters/Branches of the respondent are established under Article 19 of the respondent's constitution.

(c) That Section 24 of the Labour Relations Act authorizes the respondent to establish branches and apply for their registration. Again, it is the respondent's Secretary General to apply and designate the Branches/Chapters. These branches are not given separate legal entities on their own to maintain suits.

(d) That Section 48 of the Labour Relations Act, 2007 requires that a trade union provide the Cabinet Secretary for Labour, Social Security and Services with a specified account of the union wherein employers are to pay their employees' union contributions.

- (e) That a Gazette Notice was duly published as per Section 48 of the Labour Relations Act, 2007 being Legal Notice No. 38 to the effect that an employer who employs not less than five members of the respondent to pay the monthly deduction of the member to the respondent's account number 175-120-4841 at the Barclays Bank of Kenya, Moi Avenue Branch Nairobi.
- (f) That the Gazettement and designation of the union account is requirement of the law.
- (g) That upon receipt of the contributions, the respondent would thereafter pay the Chapters 60% of the amounts so received. This applies to all the 31 Chapters of the respondent and not the claimant alone.
- (h) That the respondent duly notified its Chapter members of the provisions of the Gazette Notice.
- (i) That in adherence to the constitution of the union and the Gazette notice, the claimant's Executive Committee passed a resolution a meeting held on 12th April 2017 to have the respondent's national office receive the contributions and thereafter pay the branch officials allowances and honoraria which has been done to date.
- (j) That upon receipt of the members' contributions for the year 2017 from the employer, the respondent duly paid all the salaries to Chapter officials and the remaining balance has been released to the claimant's account.
- (k) That the claimant's Secretary General who is mandated to represent the claimants and convey its decision has already informed the respondent of the claimant's branch resolution and has acknowledge that the branch is function normally.
- (l) That further the current suit is only instituted by 5 out of 19 Chapter members of UASU, University of Nairobi Chapter and is a clear indication that the claimants represent their own personal interest when they filed the current suit and not the University of Nairobi chapter's interest.
- (m) That the claimants' prayers are based on an illegal practice where the Chapters would receive the members' monthly contributions which the Honourable Court cannot regularize being that the law and gazette notice demand that the contributions be paid to the respondent's designated account.
- (n) That in any case it is also unlawful and impractical to have the branches receive the respondent's contributions and then forward them to the respondent. That practice had resulted to numerous defaults in payments, which was prejudicial to the operations of the respondent.
- (o) That the respondent is legally authorized to receive contributions from it members and appropriate the funds for the chapter in accordance with the interests of the various Chapters.
- (p) That the orders sought would undermine the provisions of the Labour Relations Act, Gazette Notice No. 38 and the respondent's constitution.
- (q) That it is event that the UASU, University of Nairobi Chapter is having internal disputes considering that only 5 out of the 19 members are part of this suit, as such there is a high possibility that the members' contribution will be misappropriated and not put into use as dictated by the law were the same challenged through the Chapter before reaching the respondent.
- (r) That the claimants have not exhausted the internal dispute resolution mechanisms of the respondent prior to instituting the current suit as provided in its constitution. Having failed to do so, the claimant's application dated 25th April 2017 and the entire suit is premature and vexatious.

5. Dr. Bosire filed a further affidavit on 3rd July 2017, which was essentially argumentative and were

matters which could have been covered in submissions in support of the application.

6. In his submissions in support of the application. Mr. Ogembo for the claimant submitted that since the formation of the Chapter in 2003, there has been a smother process and formulae aimed at sharing the union funds in an amicable manner. However, the respondent with no colour of rights and in contravention of its own legal instruments unilaterally made a decision to uniform the employee of the Chapter, being University of Nairobi, to remit the funds directly to the respondent with the promise that the respondent would remit to the Chapter their rightful shares.

7. However, the respondent has refused to remit the 60% of the contributions received from the chapter and the activities of the Chapter have been severely affected.

8. On the issue of sharing funds, counsel submitted that the Article 4 (c) of the respondent's constitution mandates the National Delegates Conference (NDC) to determine the issue of membership and subscription fees.

9. Article six (b) provided that the NDC was the supreme authority of the union. I that the supreme authority to determine all the issues that appertain to subscription fees and how the same ought to be shared between the branches and the national office.

10. The NDC therefore on its 22nd session held on 13th June 2014 passed a unanimous resolution that the ratio of sharing between national office and the Chapter office be retained at 40% to the national office and 60% to the chapters.

11. Further by a letter dated 5th September 2016, the respondent's national office write to the chapter requesting for financial assistance to pay office rent indicating the amount would be deducted from the 40% subscription that the Chapter sends to the national office.

12. On the issue of receipt of the entire 100% of the union dues and agency fees, Mr. Ogembo submitted that the respondent had not disputed this fact. Further that in annexure "RB7" in the supporting affidavit, the respondent directed the employee to forthwith remit 100% of all members' dues to it.

13. According to counsel, previously the chapter would collect funds and retain the 60% and remit 40% to the national office. He further submitted that the claimant did not have an issue with the change of mind by the respondent. All it required was that 60% of the said contributions be remitted to the Chapter.

14. Regarding the prayer for remission of Kshs.6,634,669.20/=, counsel submitted that paragraph 9, 10 and 11 of the claimants further affidavit correctly captured that between January – March 2017, the respondent received Kshs.10,825,957/= from University of Nairobi. None of these figures has been disputed by the respondent therefore applying the 60% rule, the same due to the claimant matches with the sum prayed for.

15. Regarding the question of Chapter funds, Mr. Ogembo submitted that Article 20 (e) is clear on how chapter funds ought to be utilized. The 2nd claimant was the Chapter's Treasurer and principal custodian of the chapter funds. Any payments made out of the chapter funds must be authorized and channeled through her.

16. Counsel therefore submitted that any other attempted utilization of the chapter funds would be illegal. Counsel further submitted that up until the time of filing this claim the 2nd claimant had been denied the chapter funds.

17. What the respondent did after receiving demand for remission of chapter funds was to without consultations with the Chapter Treasurer pay what it termed as allowances and honoraria of the chapter officials which payments were made directly into accounts of these officials and without their consent or information. Previously it was the responsibility of the Chapter Treasurer to effect these payments as per

her authority under Article 30 (e) of the constitution.

18. This system of direct payment, counsel submitted was illegal and unprocedural and amounted to pilferage of Chapter funds.

19. Mr. Koceyo from the respondent on his part submitted that the respondent never acted outside the law when it caused to be published a Gazette Notice directing the employer of its members to cause to be paid to the respondent's account all trade union dues. The gazette and designation of the trade union account was a requirement of the law and more specifically Section 48 of the Labour Relations Act, which required that trade unions provide the Cabinet Secretary for Labour, Social Security and Services with a specified account of the union where employers are to pay their employees' union contribution.

20. In support of this submission counsel relied on the case of **Republic –v- Commissioner General KRA and 2 others, Ex Parte Dock Workers Union [2016] eKLR** and **Kenya Petroleum Oil Workers Union –vs- Kenya Pipeline Company and 2 others [2017] eKLR**.

21. On the issue whether the respondent ought to have consulted with the claimant prior to the publishing the gazette notice, counsel submitted that Section 48 of the Labour Relations Act employers the respondent to cause it to be published a notice directing the employer of its members to cause to be paid the trade union dues in a designated union account and the issue of consultation is not provided for. According to counsel, the respondent would thereafter pay the Chapter 60% of the amount received.

22. Regarding the complaint that respondent withheld the Chapter's funds Mr. Koceyo submitted that the respondent has not at any time withheld the chapter's funds. According to counsel upon receipt of members' contribution for 2017 for the employer, the respondent duly paid all the salaries to the chapter officials and the remaining balance was released to the claimants' account.

23. Further, the claimant's secretary General who is mandated represent the claimants and convey its decision had already informed the respondent of the claimant's branch resolution and had acknowledged that the branch was functioning normally.

24. Concerning whether prayers sought should be granted, counsel submitted that the prayers were based on an illegal practice where chapters of the respondent would receive the members' monthly contributions which the court cannot regularize because the law and gazette notice demand that contribution be paid to the respondent's designated account.

25. Regarding whether the chapter should receive money on behalf of the union, counsel submitted that the Chairman and the Secretary General have management differences and it would be impractical for the claimants to receive money for the same would be mismanaged due to internal wrangles.

26. The court has carefully reviewed and considered the application, supporting affidavits, respondent's response and submissions by counsel from both sides and is of the view that the only contested issues are whether the respondent should be ordered to pay the sum of Kshs.6,634,669.20/= to the claimants.

27. Second, whether this court should order that the claimant is entitled to receive and hold 60% of the members' monthly contributions with respect to the Chapter as per the constitution and resolutions of the respondent.

28. There seems to be no dispute that the claimants are entitled and have been receiving 60% of the members' contribution from the respondent.

29. There however seem to be a dispute over whether the sum of Kshs.6,634,669.20/=, which cover the period from January to March 2017, has been remitted to the claimant. According to the respondent, the 60% entitlement has been remitted to the claimants net of salaries and allowances paid to the claimant's staff and officials.

30. This is an interlocutory application hence the court must not issue orders whose effect would be disincentivise the hearing of the main claim.

31. The issue of whether the claimant should receive and retain 60% of the union dues received from members can only be decided upon at the main trial. However the entitlement to the 60% of the union dues has not been contested by the respondent and the court will not be doing anything new by pronouncing that the arrangement continues pending the hearing and final determination of the main claim.

32. Further the court will not make any pronouncement on the quantum of the 60% at the interlocutory stage because there is contention by the respondent that the 60% has been remitted to the claimants net of salaries and allowance for claimants' staff and officials. The issue whether this was procedural and proper is matter for the main trial.

33. In conclusion, the order which commends itself to me as appropriate to make at this stage is to direct that the respondent continues to remit the 60% of the members' dues collected to the claimant as has been the practice pending the determination of the main claim.

34. Costs shall be in the cause.

35. It is so ordered.

Dated at Nairobi this 1st day of December 2017

Abuodha J. N.

Judge

Delivered this 1st day of December 2017

Abuodha J. N.

Judge

In the presence of:-

..... for the claimant

..... for the Respondent