



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 351 OF 2016

AIRPORT BRANCH OF TRANSPORT

WORKERS UNION KENYA1ST CLAIMANT

TITUS WAMALWA KHAEMBA

(BRANCH SECRETARY).....2ND CLAIMANT

VERSUS

TRANSPORT WORKERS UNION KENYA.....1ST RESPONDENT

DAN MIHADI (GENERAL SECRETARY).....2ND RESPONDENT

REGISTRAR OF TRADE UNIONS.....3RD RESPONDENT

RULING

1. On 7th March, 2016, the claimant filed a Notice of Motion under certificate of urgency seeking on the main that:-
 - (a) That pending the hearing and determination of this application, an Oder of Injunction do issue and restraining the 1st & 2nd Respondents from proceeding with elections of the 1st Respondent on 19th March, 2016.
 - (b) That pending the hearing and determination of the application, an order of injunction do issue and restraining the 2nd Respondent from interfering with the elections of the 1st Claimant.
2. The application was supported by the affidavit of Titus Wamalwa Khaemba who deponed on the main that:-
 - (a) That he is the Deputy Secretary of the 1st Respondent and the Branch Secretary, airport Branch hereinafter referred as “the union” hence competent and duly authorized to swear this affidavit.
 - (b) That in the month of November, 2015, the 3rd Respondent in a circular dated 25th November

2015 Ref; MLSSS/TU/ELECTION/2015 titled "TO ALL REGISTERED TRADE UNIONS, EMPLOYERS' ORGANISATIONS AND FEDERATIONS" called for branch and national elections to be held on or before the 30th March 2016 and 30th June 2016 respectively.

(c) That the 2nd Respondent issued notices to all branches to conduct the elections vide letter dated 4th January 2016 stating that "whereas the law provides that officials have a right to defend their positions in cases where they have ceased to be union members, current and contributing members should be given a fair chance to compete.

(d) That upon receipt of the said notice and in compliance with the said notice as Branch Secretary, airport Branch, I issued notice to all members and officials of Airport branches and called for elections in my letter dated 27th January 2016 informing them of the election date (on the 13th February, 2016) and the posts to be filled.

(e) That prior to the elections, I submitted the names of candidates for new and serving officials to the County Labour Officer on the 9th February 2016 enclosing the various application letters as required by the 1st Respondent registered constitution and copied the same letter to the General Secretary.

(f) That the 2nd Respondent in his letter dated 8th February 2016 gave out a parallel list of six (6) names for elections and omitted my name and other contestants.

(g) That arising out of the 2nd respondent's parallel lists, the elections could not take place and through his letter dated 15th February, 2016, the Labour Officer noting the discrepancy directed the claimant and the General Secretary to resolve the issue.

3. On 9th March, 2016 when the application came before me ex parte, I directed that the same be served on the respondents and that the same be mentioned before any Judge on 16th March, 2016 for directions on haring. In the meantime I issued an order suspending the Branch elections scheduled for 13th March, 2016 until 16th March, 2016.

4. On 16th March, 2016, the matter was listed before me again and Mr. Mihadi who appeared on his behalf and for the respondent informed me that he was not ready to proceed since they were served on the previous Friday, hence needed more time to respond. I was however informed that the National elections that were contested by the applicant were scheduled for 19th March, 2016. In the circumstances I directed that Mr. Mihadi file and serve his response to the application by close of business on 16th march and that the matter be set for argument before me the next day 17th march, 2016.

5. Mr. Mihadi in his replying affidavit deponed on the main as follows:-

(a) That the Airport Branch was first registered as KAHL (Kenya Airways Handling Ltd) branch and later changed to Airport Branch with mandates to represent unionized employees within Airport in the republic of Kenya. This is in line with the 1st respondent constitution Rule 21.

(b) That on 25th November, 2016 the Registrar of Trade Union issued elections guidelines for all Trade Unions to carry out their elections in line with their constitution.

(c) That the Claimant contrary to the 1st respondent constitution, issued election notices to individuals and companies outside the Airport jurisdiction. (e.g. A.A. of Kenya with its offices along City Cabanas and Hurligham Areas and who became members of the Nairobi Branch way back before the establishment of the Airport Branch) and thus encroaching on the membership of other registered branches of the 1st respondent (in particular Nairobi Branch).

(d) That the 1st respondent constitution under Rule 6 f read together with rule 20 requires for approval of elections applications to be approved by the General Secretary and union secretariat of the 1st respondent.

(e) That the applications were not approved and the claimant was duly notified for the reason of non-approval and a copy delivered to the Labour Commissioner.

(f) That the claimant has a pending criminal case for illegal diversion of union funds and is duty bound to be called by the Court handling the case before applying for new election mandates. This was a decision of the National Executive Committee since it is a question of integrity and witness are members, employers and officials of the union.

6. In his oral submissions before me, Mr. Khaemba on his part submitted that as the Branch Secretary he had power to convene meetings. When he received the timetable for elections issued by the Registrar of Trade Unions he called for the Branch elections on 13th February, 2016 and received applications from various candidates interested in contesting for the various posts due for contestation. According to him rule 20 of the Union's Constitution sets out criteria for eligibility for elections and that those who applied complied with this rule.

7. He compiled the list and forwarded the same to the Returning Officer and copied the same to the 2nd respondent. According to Mr. Khaemba, the Returning Officer told him that he received a letter from the 2nd respondent barring some members from contesting the elections. These were candidates from Commercial Transporters, AA of Kenya, the current branch treasurer and himself. With regard to AA of Kenya and Commercial Transporters, they were disqualified because they were not members of the Airport Branch and for himself and the Treasurer, they were disqualified because they had a pending criminal case against them in Court. Mr. Khaemba argued that under article 50(2) of the Constitution, they ought to be presumed innocent until proven guilty and that section 31(5) of the Labour Relations Act only bars from contesting an office, those persons who have been convicted of criminal offences involving fraud or dishonesty. According to Mr. Khaemba, his trial and that of the Treasurer is still ongoing hence they were eligible to contest.

8. Mr. Mihadi on his part submitted that elections are conducted in accordance with rule 6 (f) read together with rule 20 (d) (i) of the Union's Constitution. Under these rules the Secretary General has the mandate to approve contestants. Approval is mandatory and includes refusing to approve. According to him, the persons left out were not members of the Union's Airport Branch. Airport Branch was restricted to Airport area. He contended further that no extract of the register had been annexed to show the candidates were members of the Airport Branch. He stated that Commercial Transporters were based in Industrial Area while AA were in Hurlingham.

9. Mr. Mihadi further contended that the 2nd claimant and the Treasurer were undergoing prosecution for opening parallel Union's account and diverting Union's funds to it hence their integrity was in question.

10. He denied stopping the Branch elections and that he only gave recommendations and that it was the 2nd claimant who adjourned the meeting.

11. Mr. Mihadi further stated that there was a pending cause number 249 of 2016 involving the same parties and same issues before Lady Justice Wasilwa.

12. He further stated that delegates to National elections are as provided under rule 8(b) of the Union's Constitution. That is the Chairman, Secretary General and Treasurer. There is no vacuum in the 2nd claimants Branch. These officials are there and can attend the National elections and vote.

13. In answer to Mr. Mihadi's submissions Mr. Khaemba stated that he did not postpone the Branch elections but rather it was the Labour Officer who did. Regarding cause number 249 of 2016 he stated

that he withdrew the same after he realized the advocate who filed the same did not hold a valid practicing certificate at the time he filed the case.

14. The Court has considered the factual background of this dispute and the legal arguments by either parties' representatives and decides as follows:-

(a) The National elections scheduled for 19th march, 2016 shall proceed as planned since any stoppage at this point would not only occasion the 1st respondent a great deal of inconvenience and expense but also interfere with the elections calendar issued by the 3rd respondent, Registrar of Trade Unions.

(b) The 2nd claimant and other delegates eligible to attend and participate in the Unions National elections scheduled for 19th march, 2016 shall so attend and participate in the said elections.

(c) The 1st respondent through its Executive Board do resolve the issue of who qualifies to be members of its Airport Branch within 30 days of this order.

(d) The Branch elections for the Union's Airport Branch be conducted within 30 days after resolution of the dispute over who the bona fide members of the union's Airport Branch are.

(e) Either party shall be at liberty to apply to Court for any consequential directions of these orders.

15. It is so ordered.

Dated at Nairobi this 18th day of March 2016

Abuodha Jorum Nelson

Judge

Delivered this 18th day of March 2016

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha Jorum Nelson

Judge