



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 34 OF 2016

ALBERT CHIVINI MWIROTSI 1ST CLAIMANT

SIMON DISCKSON 2ND CLAIMANT

DANIEL NTAWAUSA WUANTAI 3RD CLAIMANT

VERSUS

REGISTRAR OF TRADE UNION 1ST RESPONDENT

KENYA ELECTRICAL TRADES & ALLIED WORKERS UNION 2ND RESPONDENT

RAPHAEL MACHARIA 3RD RESPONDENT

RULING

1. The Claimants through the Notice of Motion brought under the provisions of Article 41(3) of the Constitution and section 12 of the Employment and Labour Relations Court Act seek for orders that;

- i. *Spent.*
- ii. *Spent.*
- iii. *That the 1st Respondent be restrained by way of an injunction or otherwise from receiving, acknowledging results and or returns in respect to the 2nd Respondent and specifically Mt. Kenya South East Branch or acting in such manner that will recognise approve and or acknowledge the purported elections carried out by the 2nd Respondent in respect of Mt. Kenya South East Branch pending the hearing and determination of the suit.*
- iv. *That the 2nd Respondent be restrained from endorsing, approving, accepting, acknowledging and or acting in such manner that will give the purported elections recognition of the purported election carried by its Mt. Kenya South East Branch.*
- v. *That the elections purportedly carried by the 2nd Respondent in respect to Mt. Kenya South East Branch on 9th January 2016 be cancelled and subsequently rendered null and void ab initio and as a consequence call for fresh elections upon the determination of this application and or suit.*
- vi. *That the 3rd Respondent herein be restrained from acting or assuming office as an official of the 2nd Respondent specifically Mt. Kenya South East Branch and as a consequence be barred from vying for any position in the said Branch on the basis of ineligibility.*

2. The application is supported by the annexed affidavit of the 1st claimant, **Albert Chivini Mwitotsi** and on the grounds that the 2nd Respondent called for elections by issuing notice pursuant to its

own Constitution on 30th December 2015 but the notice was in flagrant breach of the constitution. The 3rd Respondent was allowed to vie for a position as chairman with the 2nd Respondent in respect of Mt. Kenya South East Branch (the Branch) elections despite the fact that he is not a member of the said Branch. The Claimants will suffer prejudice noting the purported elections were in breach of the 2nd Respondent constitution, the notice calling for elections did not disclose the time for the elections as required under article 15.2 of the constitution. The Claimants had a legitimate expectation of proper elections carried out in a manner embracing democratic ideals enshrined in the 2nd Respondent and in conformity with the constitution.

3. In his affidavit, Mr Mwiroti avers that by virtue of his employment he was a member of the Branch of the 2nd Respondent that held elections on 9th January 2016. On 30th December 2015 the Branch secretary issued notice for elections and general meeting but failed to indicate the time for the same contrary to article 15.2 of the 2nd Respondent constitution. This was material as many employees and members work in shifts and without noting the time for the elections, they became prejudiced. Members from 15 depots with the Branch were unable to participate. The elections held contradicted the Constitution and thus irregular and unprocedural. The Court should declare the elections as not legitimate and call for fresh elections.

4. In reply, the 1st Respondent filed the **Replying Affidavit** sworn by **I. E. N. Gicheha** who avers that as the 1st Respondent the office directed all trade unions and employer organisations or federations to hold elections from January 2016 to August 2016 vide circular dated 25th November 2015. In compliance, the 2nd Respondent Branch elections were held on 9th January 2016 and on 14th January 2016 notice of change of names or title was filed with the 1st Respondent for consideration. On 20th January 2016 the 1st Respondent was served with a Court order stopping receiving, acknowledging results or returns in respect of the Branch elections and since the office had not acted on form Q they did abide. However, the application by the Claimants does not disclose any cause of action against the 1st Respondent as the dispute is between the 2nd Respondent and the Claimant and the 1st Respondent is ready to abide by the Court decision.

5. The 2nd and 3rd Respondents in reply and opposition to the application by the Claimants filed the **Replying Affidavit** of **Kolil Koskey** the 2nd Respondent Deputy General Secretary. He avers that elections for the Branch were conducted in compliance with the Constitution and 3rd Respondent was validly elected as the chairman as at the time he had been transferred from 13th November 2014 and was placed within the Branch. All depots successfully carried out elections following notices issued per the Constitution and in the presence of the presiding Labour officials and returns made. All paid up members are allowed to participate in elections per article 17.4 of the Constitution and the list of such members is available at the union head office.

6. Mr Koskey also avers that the Claimants are former Branch officials and have previously conducted elections or been delegates and are well aware of the system of elections – depots conduct elections of committee members and delegates within the venue and the same is then handed over to the presiding officer. The procedures for elections are well known to the Claimants and only filed the current suit upon losing in the elections. The application is therefore not filed in good faith. The election notice submitted by the Claimants is suspect as it did not originate from the Branch secretary Mr James Maina and at all times the 1st Claimant was the Assistant Branch Secretary who had ample time and opportunity to access the union letter heads.

7. Mr Koskey also avers that the elections presiding officer, the Labour Officer officiated at the elections and was able to address all contestations brought to his attention. The 2nd Respondent vide letter dated 14th January 2016 also addressed all matters raised by the Claimants.

8. The Respondents have gone through huge expenses to conduct the elections and in the interests of justice it is only fair and just that the Court decline to issue the orders sought. The application is made in

bad faith as all officials were lawfully and procedurally elected. The Constitution of the 2nd Respondent was adhered to and the elections conducted in a democratic manner. The Claimants attended at the elections as well as members from Mandera and Kiambu. The application should be dismissed with costs.

9. Mr Mwiroti filed his **Further Affidavit** on 29th February 2016 and avers that the transfer of the 3rd Respondent was done on 13th November 2014 but there was an email forestalling the same and at the time of the elections he had not reported at the new station. Not all depots got election notices and the submitted notices by the Respondents are an afterthought. The elections were not successful as the returns made indicate the 3rd Respondent got 196 votes while the register of voters show only 171 members voted which is an obvious anomaly. The notices filed do not have a genuine signature of James Maina who should submit his specimen signature for verification. The application submitted is meant to remedy an election anomaly that was obviously unlawful. Only 171 members voted out of a total 673 which is 25% and thus not a true representative of the members wishes.

10. A **Further Affidavit** was also filed by **Samuel Mathuva James** a member of the Branch. He has previously participated in the Branch elections and the practice is to post notices at every depot and in his case there was no notice pinned at the Kitui depot to inform contestants of the elections for 9th January 2016 at Thika stadium. He was present at Thika municipal Stadium on 9th January 2016 where top six officials were elected. The election of 10 committee members and 4 delegates was not done which were supposed to be done on the same day.

11. **Ben Laisa Wenyaa** also filed his **Further Affidavit** a member of the Branch and avers that he is from the Ruiru depot and no election notice was posted there to indicate elections were being held at Thika municipal Stadium on 9th January 2016 but on the due date he proceeded to the Stadium where top 6 officials were elected. The election for Ruiru depot committee member was conducted on 13th January 2016 but this was supposed to have been done together with the election for top 6 Branch officials.

12. **Robert Otwani** in his **Further Affidavit** avers that he is a member of the Branch stationed at Thika Arcade. On 9th January 2016 he was at the Thika Municipal Stadium where elections for top Branch officials were held but the 10 committee members and 4 delegates were not conducted which was contrary to previous practice.

Determination

13. The gist of the application by the Claimants is the elections held on 9th January 2016. The claimant's contest that the Registrar of Trade Unions should not receive returns with respect to the Union Branch elections and the elected officials should not be endorsed as the election should be cancelled and there be new elections. That the 3rd Respondent should not assume office and should be barred from running in subsequent elections. The rationale for the orders sought are that the notice for the elections was issued in breach of the union constitution; the 3rd Respondent was allowed to vie despite not being a member of the Branch; the Claimants shall suffer prejudice if the elections are not nullified as they were in breach of the constitution; and the Claimants had a legitimate expectation that the elections would be democratic.

14. It is imperative to state here that elections in their nature are supposed to be democratic and therefore a contest has to ensue. Where elections relate to leadership in trade unions, such is regulated by law and based on the existing union constitution. The foundational basis for such elections is found under the Bill of Rights and the Constitution where the right to association is entrenched and further the right to join and participate in union activities is engrained. Under the Labour Relations Act, section 4(2) thus provides;

(2) Every member of a trade union has the right, subject to the Constitution of that trade union to

(a) participate in its lawful activities;

(b) participate in the election of its officials and representatives;

(c) stand for election and be eligible for appointment as an officer or official and, if elected or appointed, to hold office; and

(d) stand for election or seek for appointment as a trade union representative and, if elected or appointed, to carry out the functions of a trade union representative in accordance with the provisions of this Act or a collective agreement.

15. These provisions are given further details and emphasis at section 34 of the Labour Relations Act as follows;

34. (1) the election of officials of a trade union, employers' organisation or federation shall be conducted in accordance with their registered constitutions

...

(5)The Registrar may issue directions to a trade union, employers' organisation or federation to ensure that elections are conducted in accordance with this section and their respective constitutions.

16. In this case, parties admit that there is a union Constitution and the 1st respondent, Registrar of Trade Unions had issued notice for the holding of elections. The elections were to be held in accordance with the Constitution registered with the 1st Respondent on 28th September 2011. Under the union Constitution Branch organisation is set out under article 15. Under clause 15(2) it provides;

The national Executive Board shall direct the national general secretary to give notice to all branches to hold Branch General Meetings of members normally every five years. The Branch secretary on receiving the notice shall in turn give at least one week notice to all members of his/her Branch indicating the date, time and venue of the said general meeting.

17. It is contested by the Claimants that the notice was issued noting the Branch elections would be held on 9th January 2016 indicating the venue but the time was not stated and since majority of members work in shifts were not able to know the time and thus plan to attend.

18. Indeed article 15(2) of the union Constitution directs that in the notice issued for Branch elections, the *date, time and venue* for the general meeting where elections are to be held must be stated. Mr Mwiroti contests the notice attached by the Respondent indicating the call for elections dated 30th December 2015 was not signed by James Maina as the Branch secretary. That the signature is known to him and the one appended on the notice is not that of James Maina. Annexure "ACM2" to Mr Mwiroti affidavit in support of the application is strikingly different from annexure "KK3" annexed to Mr Koskey Replying Affidavit. On the one hand the Claimants have a notice that does not indicate the time for the holding of the Branch general meeting and elections while the notice attached by the Respondents has a time indicated noting the Branch general meeting to be held on 9th January 2016 is at Thika Municipal Stadium from 8.00am to 2.00pm.

19. An election cannot simply be nullified for the single reason that a notice did not state the time where there is overwhelming evidence and confirmation on oath that the Claimants attended at the elections and participated in the elections. Where time was not indicated according to the notice filed by the Claimants such is challenged by the fact that they admit under oath that they were at the venue of the meeting, they participated in the elections and lost. Such evidence is given emphasis by the **Further Affidavits** of Samuel Mathuva, Ben Laisa Wenyaa and Robert Otwani. They are from different depots of the Branch and got the meeting notice and were at the venue of the meeting and participated in the

elections. The attendance and presence at the elections venue is crucial here. It confirms that the Claimants and the 3 stated members had prior knowledge of the meeting and elections held on 9th January 2016. It cannot therefore be true that the Claimants did not know the hours set out for the meeting and elections.

20. I find no evidence of any depot or Branch members who were working in a shift and were not aware of the meeting notice and the timeline for the elections. As such, the elections held were done in an open and transparent manner and fairly conducted. The number of members present at the appointed venue and were eligible to vote exercised their democratic right to vote or not to vote. The outcome of the elections cannot therefore be faulted on the reason that the time for such elections is contested. Such I find to be a sham allegation. It cannot be used to change the tide and the election of new Branch officials.

21. The union Constitution requires that the Branch secretary is the one to issue the meeting notice. As such, James Maina being the Branch secretary had the mandate to issue the meeting notice. Such is attached to the affidavit of Mr Koskey the Deputy General Secretary, an official senior in position than the Branch officials and the key custodian of the union records at the head office of the Union. The primary records to confirm any status of events within the union is the records held by its officials. As such, where the Claimants allege that the signatures appended to the meeting notices of the Branch secretary are suspect, the duty is upon them to prove. The record of the notice issued I find to be the one submitted by the Deputy General Secretary Mr Koskey. Such notice led to the attendance and participation of the claimants at the venue of the meeting and elections at the scheduled time. On such evidence, it cannot be possible to then challenge that they Claimants were not aware of the meeting and election time as alleged. I find the meeting and elections procedural and in accordance with the Union constitution.

22. The question with regard to the participation of the 3rd Respondent in the elections arose. The challenge is that he was not a member of the Branch as upon his transfer to the Branch the same was forestalled through an email that came to the attention of Mr Mwiroti. Such email is not attached and in any event, there is a letter of transfer dated 13th November 2014 annexure “KK2” to the affidavit of Mr Koskey. The 3rd Respondent was transferred to Mt. Kenya South at Thika Depot. There is no other record revoking such a transfer.

23. Democratic elections are not equivalent to a particular candidate winning. It involves awareness of the election, participation in vying and voting in an open and transparent process. Such is what is called a *fair election*. *Fair* in the nature that the election is reasonably held within the required limits, and where looked at with an open mind, one can say that each candidate and voter were given a reasonable chance to participate. In any ordinary setting, not every person willing and with intent to participate in an election is able to attend due to reasons, some beyond the control of the organisers of the same. As such these challenges of those who fail to attend cannot be visited upon the organisers of the elections. What is required to be demonstrated within the realms of a *fair election* is that there was prior notice that came to the attention of members supposed to participate in the elections and that on the due date there was such a free and fair environment that allowed those who presented themselves to participate in a transparent manner at the elections. In this case such *fair* requirements for the elections of the Branch officials are regulated by the union constitution, the applicable law and the tenets of the right to associate and participation in union activities. Such I find are matter that the respondent dully adhered to and the eventual election conducted on 9th January 2016 for the Branch were fair and for the purpose herein, were lawful.

24. As such a losing candidate who challenges an election that is *fair* has a heavy burden to demonstrate the exceptional circumstances that a reasonable and open minded person would find to negate the same. In this case I find no such evidence to challenge the validity of the elections held on 9th January 2016 for the branch.

25. To file the application without the necessary evidence and sustain it this far, for the simple reason(s) that the Claimants lost in the elections is to engage in a goose chase. This is to put other parties

into unnecessary expense. As such the Claimant shall pay costs herein.

26. I have looked at the memorandum of claim. The prayers therein are a replica of the orders sought in the applications and Notice of Motion. With the above analysis and finding, the claim is not sustainable.

The application dated 15th January 2016 must therefore fail. The application by the Claimants herein is hereby dismissed in its entirety together with the claim. The Claimants shall pay costs.

DELIVERED IN OPEN COURT AT NAIROBI THIS 16TH DAY OF MARCH 2016.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Lilian Njenga

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