



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

PETITION NUMBER 18 OF 2015

DAVID O. ODUNGA

HILLARY U. MUTULI & 69 OTHERSPETITIONERS

VERSUS

THE SECRETARY GENERAL

acting for **THE KENYA UNION OF COMMERCIAL,**

FOOD AND ALLIED WORKERS.....1ST RESPONDENT

THE MANAGING DIRECTOR

acting for **NAKUMATT HOLDINGS LIMITED.....2ND RESPONDENT**

RULING

1. Concurrent with petition herein, the petitioner filed a Notice of Motion dated 13th February, 2015 under certificate of urgency seeking in the main orders:-

- a. That pending the hearing and determination of this suit and application or further orders of this Honourable Court standing issue Order to vacate and quash the decision of the 1st Respondent dated 23rd February, 2013 withdrawing M/s David O. Odunga and Hillary U. Mutuli as the Central Staff Committee's Chairman and Secretary and subsequent union membership respectively, forthwith.
- b. That pending the hearing and determination of this application or further Orders of this Honourable Court, a prohibitory/restraining Orders do issue against the Secretary General acting for the 1st Respondent, their agents and/or servants from interfering, violating denying, infringing and/or threatening the Petitioners.

2. The application was supported by the affidavit of David O. Odunga who deponed in material facts that:-

- a. That he was the current Nakumatt Holdings Limited Chairman to the Central Staff Committee, duly seized of the matters herein and hence, competent to make oath and swear this affidavit on behalf.

- b. That he was working for economical gains at Nakumatt Ronald Ngala, Nairobi, one amongst chains of Nakumatt Holdings Limited, Supermarkets, in the Republic of Kenya.
 - c. That he knew that the Petitioners were employees of the 2nd Respondents and duly paid-up members of the 1st Respondent, all holding the portfolio of shopstewards.
 - d. That further he knew that the Petitioners/Applicants herein were shopstewards of the Central Staff Committee of Nakumatt Holdings Limited, the 2nd Respondent herein.
 - e. That sometimes in mid December, 2014 he received a letter written by Mr. Benson D. Luvayi, national Organizing Secretary of the 1st Respondent, in which in it, talked about the alleged yet to be registered trade union to warrant conflict of interest as claimed by the same.
 - f. That the Chairman and Secretary to the Central Staff Committee of Nakumatt Holdings Limited are never at any given material time union's registered officials by the office of the Registrar of Trade Unions, to cause conflict of interest in their undertakings.
 - g. That he also knew that the 1st Respondent in concert with the 2nd Respondent had been agitating amongst themselves for certain cause since the signing of the Collective Bargaining Agreement (CBA) on the 19th December, 2014 for the removal of the Chairman and Secretary of the Central Staff Committee.
 - h. That on 23rd January, 2015 Mr. Boniface M. Kavuvi, the Secretary General of the 1st Respondent wrote a letter to the Managing Director of the 2nd Respondent in reference to Mr. David O. Odunga and Hilary Mutuli who, were the current Chairman and Secretary, respectively, advising of their accreditations withdraw without citing any colour of legal backing.
 - i. That Mr. F. N. Kimotho, FKIM, Human Resource & Development manager acting for the 2nd Respondent wrote an internal memo to the Branch Managers and Regional Managers of Nakumatt Holdings Limited, dated 3rd February, 2015, withdrawing the accreditation of Mr. David O. Odunga and Hilary U. Mutuli as Shopstewards, Chairman and Secretary to the Central Staff Committee respectively, with immediate effect, while the same not being a union representative.
3. The 1st respondent filed an affidavit through Mr. Boniface Kavuvi sworn on 24th February, 2015 in which he depones mainly that:-
- a. That the petitioners have not been granted with written and signed authorities to present this petition on behalf of the other alleged petitioners.
 - b. That several petitioners have written disowning the filing of this petition and therefore the petitioners have not come to this Honourable Court with clean hands.
 - c. That out of the alleges list presented by the petitioners, Messrs Dan Opalo No. 26 and Crispo Andiego No. 29 resigned from employment in July 2014 and has since relocated to Qatar and into private business respectively, Daniel Nzuki No. 42 was dismissed from service in the year 2013 and was never at any time been a shopsteward, Clement Munyoki No. 68 resigned from employment in 2014 and joined the Kenya Defence Forces.
 - d. That the Kenya Union of Commercial food and Allied Workers and Nakumatt Holdings limited have signed a Recognition Agreement pursuant to Collective Bargaining Agreements, the last of which was signed on 19th September, 2014 and registered before this Honourable Court on 17th October, 2014.
 - e. That as per the terms of the Recognition Agreement and the Collective Bargaining Agreement,

the union has certain structures of representation at work place which includes shopstewards and the Central Staff Committee.

- f. That at all times the shopstewards and the Central Staff Committee must champion and promote the union's policies at the work place.
- g. That contrary to the union's policy and interest the 1st and 2nd petitioners there have acted and continued to act against the 1st Respondent's interest in forming and seeking the registration of a trade union known as "Kenya Supermarket workers Union" to rival and compete with the 1st Respondent.
- h. That the 1st and 2nd Petitioners application for registration was declined by the Registrar of trade unions prompting the petitioner's to move to this honourable Court and file Appeal Number 18 of 2014 seeking the registration of their union.
- i. That upon discovering that the 1st and 2nd Petitioners while holding positions of Chairman and Secretary to the Central Staff Committee were also promoting a rival trade union, the 1st Respondent wrote to the petitioners and drew their attention to the apparent conflict of interest and asked them to show cause why they should not be removed from those positions.
- j. That the 1st petitioner by a letter dated 18th December, 2014 wrote and confirmed that indeed he was promoting a rival unregistered trade union and according to him he was enjoying his fundamental freedom on the right of association.
- k. That the Petitioners having confirmed that they are hell bent on promoting the unregistered trade union to the disadvantage of the 1st Respondent's interests, the 1st Respondent had no option other than to withdraw their accreditation as shopstewards and further as Chairman and Secretary to the Central Staff Committee.

4. In his written submissions to the Court, Mr. Maina for the petitioners submitted in the main that they are adults of sound mind and disposition hence within their rights to freedom of association which included the right to form, join or participate in activities of an association of any kind.

5. Counsel further submitted that the withdrawal of the petitioners membership to 2nd respondent's Central Staff Committee was without any colour of right and did not adhere to the 1st respondent's constitution and rules of procedure.

6. Mr. Nyabena for the 1st respondent submitted that the petitioners had not been given written and signed authority to present the petition on behalf of the alleged petitioners. According to Counsel, several petitioners have written disowning the filing of the petition hence the petitioners have not come to Court with clean hands. Mr. Nyabena further submitted that the 1st respondent has a signed recognition agreement with the 2nd respondent and it should be noted that under the terms of the Recognition Agreement and Collective Bargaining Agreement, the union has certain structures of representation at workplace which include shop stewards and the Central Staff Committee. These positions are reserved for active members of the union. The shop stewards and Central Staff Committee must at all times promote and champion the Union's policies.

7. According to Mr. Nyabena the 1st and 2nd petitioners have acted and continue to act against the 1st respondents interests by forming and seeking to register a competing trade union to be known as Kenya Supermarkets Workers Union.

8. Counsel therefore submitted that the petitioner's application is incompetent and should be dismissed.

9. Interlocutory remedies are generally discretionary. They are intended to grant the party seeking

them some interim relief awaiting the trial and disposal of the main claim. A party seeking them must of essence do so in good faith and approach the Court diligently and with clean hands. The petitioner seeks an order of this Court to quash or vacate the decision of the 1st respondents dated 23rd February, 2013 withdrawing their membership to 2nd respondents Central Staff Committee. This is in the nature of an interlocutory mandatory injunction. Courts issue interlocutory mandatory injunctions only in exceptional cases since they invariably have the effect of deciding what may as well be the issue in the main claim leaving a party benefiting therefrom with little urge to pursue to conclusion, the main claim.

10. Membership to a Union or indeed any Society or Association requires of the member to espouse, promote and defend the core values and principles of that Union, Society or Association. It is untenable for a person to purport to be a member of a Society, Union or Association yet openly champion and promote the formation of a rival society, union or association.

11. Whereas articles 36 and 41 of the constitution protect the right to form, join or participate in the activities and programmes of a trade union, it is not consistent with these articles of the Constitution to lay claim for their protection while engaging in activities that injure or compete with the interest of such Union whose membership one belongs to.

12. The petitioners have not denied that they have openly formed and pursued registration of a rival union to be known as Kenya Union of Supermarket Workers. Annexure B/L5 attached to Mr. Kavuvi's affidavit is an appeal to this Court from the decisions of the Registrar of Trade Unions to register the said Union whose promoters are the selfsame petitioners. In his letter dated 18th December, 2014, Mr. Odunga, (the 1st petitioner) does not hide his intention to form a rival trade union. All he says is that it is his right under the Constitution.

13. The Court does not deny it is the petitioners right to form a rival trade union. It is indeed their Constitutional right subject to criteria for forming new unions but such right cannot be exercised while remaining in membership of the Union they intend to compete with more so as shop stewards and members of the 2nd respondent's Central Staff Committee. The honourable thing the petitioners ought to have done was to resign from the membership of the 1st respondent and pursue the formation of the rival union.

14. In the circumstances the Court finds that the petitioners have not come to Court with clean hands to warrant the grant of the orders sought which are equitable in nature.

15. The application is therefore dismissed with costs.

16. It is so ordered.

Dated at Nairobi this 8th day of April 2016

Abuodha Jorum Nelson

Judge

Delivered this 8th day of April 2016

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha Jorum Nelson

Judge