



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA
CAUSE NO. 1447 OF 2014 (AS CONSOLIDATED WITH CAUSE
NOS 1454/2014 AND 1545/2014)

JOPHINUS MUSUNDI

SAMMY B. CHESEREK

LAWRENCE KINYUA

ARPHACARD KEMBOI

LILLIAN O. OSUNGA

LYDIA N. NGARI

JOSEPH K. WADEREVACLAIMANTS/APPLICANTS

VERSUS

KENYA NATIONAL UNION OF NURSES.....1ST RESPONDENT

SETH PANYAKO2ND RESPONDENT

(GENERAL SECRETARY)

JUDGEMENT

1. On 24th September 2014 with consent of the parties Causes Numbers 1447 of 2014, 1454 of 2014 and 1545 of 2014 were consolidated with 1447 of 2014 being the lead file.
2. On 21st September 2015, with consent of the parties the court directed that the consolidated matters be disposed of by way of written submissions.
3. The Respondent filed their written submissions on 20th November 2015 and the claimants filed their written submissions much later on 10th December 2015 and served the Respondents advocate on 22nd January 2016.
4. The Gravamen of the consolidated suit as captured in 1447 of 2014 filed on 4th September 2014 is that the claimants seek the following reliefs against the Respondents;

- a) That the court be and is hereby pleased to dissolve the National Executive Council
- b) That the court be and is hereby pleased to order fresh elections for the National Executive Council
- c) Appoint a caretaker committee to manage the affairs of the 1st respondent with a specific mandate to oversee/review the union constitution and organize general elections of the union.

5. The 1st and 2nd Respondent filed their response to the memorandum of claim on 13th October 2014. However the 3rd to 9th Respondents did not file any response to the claims. It is alleged by the 1st and 2nd Respondents relying on the case of **Eleur Investment Ltd Vs Permanent Secretary Ministry of Roads and 4 others (2012) eKLR** that the 3rd to 9th respondents have colluded with the claimants to file multiplicity of suits against the 1st and 2nd Respondents to frustrate the operations of the union (1st Respondents) and remove the 2nd Respondent Seth Panyako from the position of General Secretary unlawfully and by all means.

6. That 1st and 2nd Respondents have submitted that the action by the Claimants and the 3rd to 9th Respondents is an abuse of the court process and the suits ought to be dismissed with costs for that reason alone.

Claimants Submissions

7. The Claimants have submitted that the constitution of the 1st Respondent is defective and contravenes the Constitution of Kenya 2010 in the following respects;

Chapter XVIII on elections is discriminatory in the following manner;

a) Section 5 thereof bars officials of professional associations from vying for seats as officials of the 1st Respondent in the following terms;

“no individual, official or committee members of any other union, professional societies or associations shall put himself forward as a candidate for the nomination of the union at the institutional branch or national level unless has resigned from that position six months before the general election of the union”.

8. The Claimants submit that the clause discriminates against members of professional associations who have no conflict of interest whatsoever with the union. That there is no rational basis for such discrimination and it violates Article 41 of the Constitution 2010 as read with sections (4) and (5) of the Labour Relations Act 2007 which guarantee freedom of association to all persons and the right to join and participate in all lawful activities of the union including vying for elective positions of the union.

9. That section (8) is discriminatory in that it provides for payment of exorbitant fees for nomination to vie for union offices as follows; General Secretary Kshs 50,000; any national seat Kshs 30,000 and any branch seat Kshs 20,000.

10. That section (9) provides that for one to be elected as General Secretary of the union one must have been in the union leadership for at least five years. The Claimants submit that the clause is discriminatory in that the 1st Respondent is a growing union having been registered in the year 2013 and by the end of five years the only person who shall have had experience of 5 years shall be the incumbent.

11. Section (11) provides that for a person to vie for a seat as an official, one must have worked in mainstream health care delivery for not less than five years. The Claimant submits that this clause is ambiguous since mainstream health care delivery is not defined anywhere in the Union constitution or in law.

12. With regard to **Chapter XIX** of the union constitution section 5 provides;

“The founding officials shall not be subjected to an inaugural election”. The Claimants submit that this clause discriminates against other would be leaders and only favour the incumbents. That the clause automatically nullifies other electoral provisions as it means all the founding officials will serve a further five (5) years term without being subjected to any election.

13. That section 34(2) of the Labour Relations Act 2007 provides;

“The constitution of a trade union, employer’s organization or federation shall-

a) Not contain a provision that discriminates unfairly between incumbent and other candidates in elections”.

14. That the provisions of Article 41 of the Constitution which guarantees every person the freedom of association and a right to join and participate in the activities of a union is inalienable and may only be denied or restricted in terms of Article 24 of the Constitution of Kenya 2010.

15. That the aforesaid sections 5, 8, 9 and 11 under **chapter XVIII – Elections and Section 5 under chapter XIX** of the union constitution violate the national constitution and in terms of Article 2 of the national constitution they are null and void to the extent of their inconsistency with the provisions of the national constitution. That the court directs the union therefore to delete the said provisions and to nullify any elections and/or actions that have been under taken by the 1st respondent (union) in pursuance of the aforesaid unlawful provisions of the union constitution.

16. That indeed the persons named in the extract of 10th September 2014 as National Executive Council officials of the union are not validly in office. Most of them are indeed serving branch officials of the various branches of the union. That the union constitution does not provide for a person to hold both branch and national office at the same time. That these officials were never elected to such national positions and should be removed from office.

17. That on 15th October 2014, the court issued an order directing the Union Trustees to run the union account in the interim and to file statements of accounts and serve the Claimant. That this demonstrates that there are no national officials of the union in place and the status of the union funds remains unknown in inviolation of the court order.

18. That the court be pleased to order fresh elections for the National Executive Council (NEC) and in the meantime issue the following orders;

a) This court to restrain the Respondents and purported hereby office holders from continuing discharging the functions of the 1st Respondent pending the conduct of free and fair elections.

b) The court directs the Registrar of Trade Union to constitute an inclusive caretaker committee within 14 days.

c) The caretaker committee organize for 1st respondent branch and national elections within 90 days.

d) All members of the union are eligible to stand for elections and to participate in the elections of the officials at both branch and national levels.

e) That the Trustees submit statement of accounts of the 1st respondent within 14 days without fail.

f) That the 2nd Respondent be found guilty of dishonesty.

Submissions of the 1st and 2nd Respondents

19. The 1st and 2nd Respondent have submitted that the consolidated suit emanates from internal wrangles in the leadership of the 1st Respondent between the Claimants and the 2nd Respondent. That the conflict arose when the 2nd Respondent Mr Seth Panyako declined to pay 3rd to 9th Respondents certain monetary claims which the 2nd Respondent deemed unreasonable and simply outrageous because payment claimed was upto Kshs 9,000,000 in some cases.

20. The Claimant was the branch secretary of Kiambu County and a former member of the National Governing Council of the 1st Respondent. The 2nd to 9th Respondents were the officials of the National Executive Council of the 1st Respondent per extract dated 11th June 2014. The 1st Respondent has new officials of the National Executive Council as per the extract dated 10th September 2014.

21. That the 3rd to 9th Respondent have not responded to the memorandum of claim filed on 4th September 2014. That they are clearly in collusion with the Claimants as against the 1st and 2nd Respondent. That their common purpose is to seek dissolution of the National Executive Council and that the court do order fresh elections. That the multiplicity of suits filed is further evidence of the said collusion as the extract dated 11th June 2014 is the core subject of Cause No 1447 of 2014 and Civil Appeal No 11 of 2014 which Appeal is challenging the decision of the Registrar in respect of the extract dated 10th September 2014 which registered the current officials of the 1st Respondent.

22. That this collusion amounts to abuse of court process and the suit be dismissed for this reason alone. On 9th October 2014, Claimant enjoined 10th to 23rd Respondents who are current officials of the National Executive Council vide an amended notice of motion filed on 9th October 2014. The claimant seeks in the amendment that a caretaker committee be appointed by the court to manage the affairs of the 1st Respondent for a period of six months with a specific mandate to oversee the review of the union's constitution and to organize general elections thereafter.

23. The 1st and 2nd Respondents submit that these prayers have been overtaken by events since elections of the 1st Respondent were held on 29th August 2014 during the National Governing Council meeting in which the Claimants had been invited to attend as members but had failed to do so. On 15th October 2014, the Claimant apparently withdrew the suit against 10th to 23rd Respondents per the amended Notice of Motion.

24. Efforts by the parties to resolve the matter via conciliation failed. The 1st and 2nd Respondents pray in conclusion that the prayers sought by the Claimants in their memoranda of claim are overtaken by events as demonstrated and granting the same will be in vain. That cause 1447 of 2014, 1454 of 2015; 1545 of 2014 be dismissed.

Determination

25. The issues for determination in the consolidated suit are as follows;

- i. Whether the reliefs sought have been overtaken by events
- ii. Whether there is justification to nullify the named provisions of the constitution of the 1st Respondent

Issue I & ii

26. The Claimant sought in the main the court to dissolve the National Executive Council and appoint a caretaker committee to oversee review of the constitution of the union and order fresh election of the

National Executive Council. The basis of this prayer is that the 1st Respondent's constitution is so flawed and contravenes the Kenya Constitution and Labour Relations Act 2007 as set out in the statement of claim.

27. Section 27 of the Labour Relations Act 2007 provides;

“(1) A trade union, employer’s organization or federation may resolve to –

(a) Change or replace its constitution; or

(b) Change of name

(2) A registered trade union, employer’s organization or federation may apply to the Registrar to approve a change of name or an amendment to its constitution and rules by submitting to the Registrar.....

(a) a notice in Form 1 or Form J as the case may be set out in the second schedule duly completed and signed by the Secretary.

(b) a copy of the resolution containing details of the change and

(c) a certificate signed by the secretary stating that the resolution was passed in accordance with the constitution and rules.

(3) Notice of the change specified in subsection (2) shall be submitted to the Registrar within fourteen days of any resolution to change the name or constitution.

(4) Upon receipt of the notice of change of name or constitution, the Registrar shall give a notice of at least twenty one days in the Gazette and in three daily newspapers of national circulation inviting any objections to the proposed change of name or constitution by members of the trade union and where any such objection is raised the Registrar shall investigate the complaint and the grounds relied upon”.

28. On the other hand **Chapter XXII** on Amendment and alteration of the constitution of the 1st Respondent provides;

(1) Alteration to these chapters shall only be made by resolution voted upon by secret ballot at a National Referendum and ratified at National Governing Council meeting or Special Governing Council meeting.

(2) All proposals for amendments shall be submitted to the Secretary General not later than eight weeks before the date of such National Referendum.

(3) No alteration of this constitution shall take effect until the date of registration thereof by the Registrar of Trade Union and thirty six months after the registration of the union”.

29. There is no evidence that the Claimants have made any proposals for the alteration or amendment of the constitution of the 1st Respondent in the manner proposed in this suit.

30. It is the court's considered view that this is an attempt by the Claimants, in collusion with 3rd to 9th Respondents to circumvent the procedure laid out in section 27 of the Labour Relations Act 2007 and **Chapter XXII (1), (2) and (3)** of the Union Constitution to alter or amend of the Union constitution. Union constitutions are done and undone by member's resolutions with the co-currence of the Registrar of Trade Unions but not by the fiat of the courts.

31. The court is not satisfied that the impugned clauses of the Constitution of the 1st Respondent offend the Constitution of Kenya 2010. If the members of the union desire to change the provisions governing the election of the union officials, the manner of doing so is clearly set out in their own constitution. The Court declines the invitation to descend into the union arena and take over the collective responsibility of members to alter or amend the document that governs the operations of the union.

32. Following the aforesaid finding by the court, there is no justification for the court to establish so called, caretaker committee, a creature not provided for in the union constitution to take over the affairs of the union either to oversee review of the constitution or conduct of the general elections of the union, matters which are solely regulated by the Union constitution itself.

33. Furthermore it is without a doubt that this suit has been overtaken by events following subsequent elections of union officials on 29th August, 2014 during the National Governing Council

34. (NGC) meeting held on the same date and Gazettement of the union officials in the extract dated 10th September 2014

35. Furthermore, the court takes judicial notice that subsequent National Governing Council (NGC) was held sometime in the year 2016 in which new officials of the union have again been elected and ELRC Civil Appeal No 6 of 2016 (consolidated with Petition 82 of 2016) have been filed by parties contesting the results of the election.

36. For these reasons the consolidated suits 1447/2014, 1454/2014 and 1545/2014 have no merit and are hereby dismissed with costs against the Claimants jointly and severally.

Dated and delivered at Nairobi this 15th day of July 2016.

MATHEWS N. NDUMA

PRINCIPAL JUDGE