



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

AT NYERI

CAUSE NO. 71 OF 2016

DOMINIC NDEGWA KIERE.....CLAIMANT/APPLICANT

VERSUS

MERCY MUTHONI NDUNG'U.....RESPONDENT

AND

REGISTRAR OF TRADE UNIONS.....INTERESTED PARTY

(Before Hon. Justice Byram Ongaya on Friday, 1st July, 2016)

RULING

The applicant filed on 08.06.2016 an application by way of the notice of motion brought under Rules 16(3), 27 (1) and 32(1) (a) and (e) of the Industrial Court (Procedure) Rules, 2010. The applicant prayed for orders as follows:

- a. That the order of 04.05.2016 directing for hearing of the cause by way of written submissions be reviewed or set aside and the cause be heard by way of viva voce evidence.
- b. That costs be in the cause.

On 04.05.2016 the court made orders by consent of the parties as follows:

- a. The application filed on 13.04.2016 is hereby dispensed with and parties to go into full hearing of the suit.
- b. The only issue for determination is whether 1st respondent has been member of KNUT for 5 continuous years on the basis of not revoking membership, paying union dues, and not having applied to join KUPPET, a union in competition with KNUT.
- c. Response to be filed and served by 10.05.2016 together with relevant list and copies of documents and the claimant may file and serve reply to response with further documents by 13.05.2016.
- d. Claimant to serve hearing notice upon the interested party by 13.05.2016.

e. Parties to file and serve written submissions by 20.05.2016.

f. Highlighting of submissions on 26.05.2016 9.00am, each party 10 minutes (20 minutes).

The applicant has submitted that new and important materials have since emerged which cannot be addressed through written submissions and require oral evidence unless admitted. Thus there is subsequent sufficient reason to subject the hearing to oral evidence. The applicant stated in the affidavit supporting the application that the subsequent facts requiring oral evidence were as set out in the applicant's further affidavit filed on 28.05.2016 explaining how the validity of the membership in KNUT was to be worked out as at the time of the elections in issue towards determination of eligibility for candidacy and voting in the KNUT elections of 04.02.2016. Thus the applicant urged to be allowed to give oral evidence to show that the respondent was not eligible as a candidate at the elections.

The respondent opposed the application by filing on 14.06.2016 the replying affidavit of Mercy Muthoni Ndung'u and filing on 15.06.2016 the grounds of opposition. The respondent has submitted that the new and important facts that require oral evidence have not been disclosed. The respondent further submits that the applicant wishes to prolong the matter until the end of the year, holding the respondent's office in limbo. The respondent urges that the applicant has not satisfied the grounds for setting aside an order by consent being establishment of fraud, mistake, misapprehension or collusion as was held in **Flora Wasike –Versus- Wamboko (1988) KLR 429** and also in **Diamond Trust Bank of Kenya Ltd –Versus- PLY & Panels Ltd and Others Civil Appeal No. 243 of 2002 (2004) 1EA 31.**

The applicant, on the other hand, has submitted that the order to be reviewed is directive as it is not a substantive order as it does not affect the substance of the cause. The order to be reviewed merely offers guidance on the course of the proceedings to assist the parties in the conduct of the proceedings. The applicant further relied upon **Halsbury's Laws of England, 4th Edition Paragraph 137** on fair hearing, that, everyone who is a party to proceedings must have a reasonable opportunity of presenting his case to the court under conditions which do not place him at substantial disadvantage.

The court has considered the parties' respective cases and submissions on the application. It is not in dispute that the parties entered the orders by consent on further steps in the cause. It is not true as submitted by the applicant that if the application is not allowed the applicant will thereby be denied a reasonable opportunity of presenting his case to the court as he will not and has not been placed at a substantial disadvantage. The orders by consent were consciously made and parties have accordingly been given a fair chance to present their respective cases. As submitted for the respondent, there is no factor that would vitiate a contract, such as fraud, mistake, misapprehension and collusion, that has been established in the present application that would justify the setting aside of the orders by consent.

Accordingly, and in conclusion, the application by the notice of motion dated 08.06.2016 is hereby dismissed with costs and the applicant is hereby directed to file and serve the final submissions in the case by Friday 8.07.2016 at 9.00am when the cause will be mentioned for directions on the judgment.

Signed, dated and delivered in court at Nyeri this Friday, 1st July, 2016.

BYRAM ONGAYA

JUDGE