



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NUMBER 69 OF 2014

HON. GEORGE M. MUCHAI, MBS,
MP.....PETITIONER

VERSUS

FRANCIS ATWOLI, SECRETARY GENERAL,
(COTU).....1ST RESPONDENT

RAJAB MWONDI CHAIRMAN GENERAL
(COTU).....2ND RESPONDENT

REBECCA MUTHOGORA TREASURER GENERAL
(COTU).....3RD RESPONDENT

FRANCIS WANGARA 1ST SIGNING TRUSTEE
(COTU).....4TH RESPONDENT

JOSEPH O. NBYABIYA 2ND SIGNING TRUSTEE
(COTU).....5TH RESPONDENT

WASHINGTON ADONNGO ODODA 3RD TRUSTEE
(COTU).....6TH RESPONDENT

THE REGISTRAR OF TRADE
UNIONS.....7TH RESPONDENT

THE CABINET SECRETARY MINISTRY OF LABOUR, SOCIAL SECURITY AND SERVICES.....8TH RESPONDENT

AND

KENYA COMMERCIAL BANK
LIMITED.....1ST INTERESTED PARTY

BARCLAYS BANK OF KENYA
LIMITED.....2ND INTERESTED PARTY

CO-OPERATIVE BANK OF KENYA LTD.....	3RD INTERESTED PARTY
ECOBANK KENYA LIMITED.....	4TH INTERESTED PARTY
KOSIEYO & PARTNERS.....	5TH INTERESTED PARTY
DELOITTEE & TOUCHE.....	6TH INTRETERESTED PARTY
THE DIRECTOR OF PUBLIC PROSECUTIONS.....	7TH INTERESTED PARTY
THE INSPECTOR GENERAL OF POLICE.....	8TH INTERESTED PARTY
CENTRAL ORGANIZATION OF TRADE UNIONS (K).....	9TH INTERESTED PARTY
KENYA UNION OF EMPLOYEES OF VOLUNTARY AND CHARITABLE ORGANIZATIONS....	10TH INTERESTED PARTY

RULING

1. By a Notice of Motion dated 9th April, 2015, the 10th Interested Party Kenya Union of Employees of Voluntary and Charitable organizations sought an order among others that the Court allows it to prosecute this petition to conclusion.
2. The application was founded on the grounds that:-
 - (a) That this matter was of great public interest, and is part heard before this Court.
 - (b) That the late Petitioner instituted this suit on his own behalf and on behalf of the workers who are members of the Bakery, Confectionery, Food Manufacturing & Allied workers Union who are equally members of COTU(K).
 - (c) That Kenya Union of Employees of Voluntary and Charitable Organizations (KUECACO) is a Trade Union within the meaning of schedule 1(1) of the fifth schedule to the Labour Relations Act, 2007.
 - (d) That KUEVACO’s membership is drawn from employees of all Trade Unions under Rule 3(a) of the Constitution and Rules of KUEVACO including all employees of COTU(K) as an employer, including all her employees at Tom Mboya Labour College, Kisumu.
 - (e) That in this petition, KUEVACO’s interest is “over the questionable probity in COTU(K)’s management of her funds, immovable and movable properties as well as donor project funds.
 - (f) That the unfortunate assassination of the Petitioner should not be the end of this matter as the cause of action still survives.

(g) That the 10th interested party be allowed to prosecute this Petition to enable the Court effectively and competently adjudicate upon and settle the grave issues that have been raised herein.

3. The application was further supported by the affidavit of one Odin Boaz Otieno (Janitor) who deponed on the main that:-

(a) That he is the Secretary General, of Kenya Union of Employees of Voluntary and Charitable Organizations (KUEVACO), (the 10th interested party and applicant herein), and its authorized representative within the meaning of “authorized representative” as defined under section 2(a) of the Labour Relations Act, 2007 and he is authorized to swear this affidavit on its behalf.

(b) That the late Petitioner in paragraph 9 of his Supporting Affidavit dated 5th November 2014, stated that he instituted the proceedings on his behalf and on behalf of the workers who are members of the Bakery, Confectionery, Food Manufacturing and Allied Workers Union who are equally members of COTU and who remit monthly subscriptions to COTU from their hard earned salaries.

(c) That the assassination of the original petitioner herein does not affect the substance of the petition, to warrant it being stood over generally or abandoned and did/does not result in the suit abating.

(d) That KUEVACO’s membership is drawn from employees of all Trade Unions under Rule 3(a) of the Constitution and Rules of KUEVACO including all employees of COTU as an employer.

(e) That the improper management of funds, assets and donor project funds has led to a violation of KUEVACO members rights with regard to their social and economic conditions.

(g) That he was informed by their advocates on record which information he believes to be true that the matter had already been certified as urgent and that it raised serious issues which are of great public interest that need to be addressed without delay.

(h) That having a matter of this magnitude and nature, without a date for hearing of the application, herein dated 5th November 2014 is prejudicial to all parties involved, especially the 10th interested party. The Court should remedy the state of affairs by setting the application down for hearing, and giving directions on how the suit shall proceed.

4. On 28th April, 2015 I directed that the application be served on all the parties and that Mr. Aduda for the 1st, 2nd, 3rd, 5th and 6th respondent serve his notice of preliminary objection as well. The Court further requested that although Dr. Khaminwa’s client had since died under unfortunate circumstances, the Court would be grateful if he could volunteer to make submissions on the legal questions raised in the application.

5. The Court further directed that any party who intended to submit on any issue raised to file skeleton submissions within 14 days from the date of the order.

6. On the 9th February, 2016 when the matter came up for submissions, Dr. Khaminwa submitted before me that the matter concerned top level corruption involving the Labour Movement and had nothing to do with the family of the late Petitioner. It was not a personal matter. According to counsel the matter ought to be investigated. The 10th Interested Party was a Labour Organization willing to take over the matter hence the Court ought to be cautious before throwing out such a matter.

7. Mr. Gitonga for the 10th Interested Party associated with Dr. Khaminwa’s submissions and stated that the orders sought in the petition were orders in rem. They related to auditing and interrogating the affairs

of the 7th respondent. According to counsel, the matter was of great public interest and directly affected the membership of the 10th Interested Party. The issue were properly captured in the petition before the Court and that the nature of the reliefs sought were not personal to the Petitioner. According to Mr. Gitonga, the Court should therefore allow his client to proceed with the Petition.

8. Mr. Aduda on behalf of his clients submitted that an Interested Party cannot purport to take over prosecution of a Petition. According to Counsel, the 10th Interested Party was allowed to join in the Petition as such and not as Co-petitioner. The Interested Party had the liberty to ask to be joined as a Co-petitioner. Mr. Aduda therefore submitted that the Interested Party as a Trade Union had a limited role and could not take personal litigation. Counsel further submitted that Order 24 of the Civil Procedure Rules under which the application was purported to have been brought did not apply to Constitutional Petitions.

9. According to Mr. Aduda Constitutional Petitions are governed by Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and procedure Rules, 2013. According to Mr. Aduda, even if Order 24 were to apply the 10th Interested Party being a Trade Union hence a body corporate could not by virtue of section 56(2) of the Law of Succession Act be appointed as legal representative of the deceased Petitioner's estate. According to Mr. Aduda, the question of who can take over or institute legal proceedings on behalf of a deceased person was succinctly decided in the **Trovistik case** and that is a person with letters of administration.

10. Mr. Kairaria for the 4th Interested Party submitted that the section of the law relied on by the applicant were not applicable to the circumstances of the Petition and were clearly irrelevant when looked at against the background of the petition. According to counsel article 48 of the Constitution concerns access to justice for all persons while article 50 concerns the right to every person to have any dispute that can be resolved by the application of law, decided in a fair and public hearing before a Court or tribunal. According to Counsel, nobody had denied the applicant access to justice or the right to have whatever dispute it had resolved in a fair and public hearing.

11. According to Mr. Kairaria, the applicant was not seeking to have the legal representative of the deceased petitioner enjoined and substituted for the deceased but instead it was seeking to be allowed to prosecute the Petition in place of the deceased.

12. According to Counsel, the applicant lacked the legal capacity to be substituted with the Petitioner because it was not a legal representative of the deceased Petitioner. Order 24(3) of the Civil Procedure Rules expressly recognized the legal representative of a deceased person as the only person who can be substituted as a party to proceedings representing the estate of the deceased if the cause or action survives the deceased. According to Counsel, the nature of the dispute and the cause of action as set out in the petition could not have survived the deceased for the benefit of his estate.

13. Counsel observed that it was instructive that the applicant did not apply to be joined as a co-petitioner with the deceased but as an interested party notwithstanding that its stated interest in the matter was over the questionable probity in COTU(K)'s management of her funds, immovable properties as well as donor project funds because its membership was drawn from employees of all trade unions including employees of COTU(K). The question which therefore arose according to Mr. Kairaria, was why the applicant wanted to ride on the back of the deceased petitioner if it had its own cause of action quite apart from the deceased petitioner.

14. Counsel further submitted that his client would be unduly prejudiced if the applicant was to be allowed to prosecute the petition on behalf of the deceased petitioner because not being a legal representative of the deceased, the 4th interested party would not be able to recover costs against the deceased estate since the applicant had no capacity to bind the petitioner's estate.

15. Mr. Thiga for the 2nd Interested Party submitted that the applicant did not provide any evidence to back the assertion that its membership was drawn from the employees of COTU and the workers who are

members of the Bakery, Confectionary, Food Manufacturing and Allied Workers Union who are equally members of COTU or those of all Trade Unions. According to Counsel, there was therefore no discernible nexus between the applicant and workers in those unions on whose behalf the Petition was filed by the deceased petitioner.

16. Mr. Thiga further submitted that the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 do not provide for situations where a petitioner has died leaving a petition pending for determination. According to counsel, whichever way it was looked, the applicant could not succeed in its endeavour to take up the prosecution of the petition for two reasons, first, the cause of action did not survive the deceased petitioner and second the applicant is not in any event a personal representative of the deceased.

17. Ms. Mumia for the 4th respondent made similar submissions as Mr. Thiga and with much appreciation to her, the Court need not repeat them here.

18. It is undisputed fact that under Law Reform Act, only those causes of action that survive a deceased persons can be continued on their behalf for the benefit of their estate. It is further undisputed that the only person competent to continue with such claims for the benefit of a deceased person is the legal representative of such deceased person.

19. The applicant has neither shown nor claimed that it intended to continue with the prosecution of the petition herein as a legal representative of the deceased petitioner. The applicant wanted to continue with the petitioner on the grounds that it raised issues of public interest and especially its membership as a Trade Union since the matter concerned financial probity of COTU(K) whose employees were also members of the applicant.

20. The questions which this Court deems necessary to determine in order to resolve this dispute are two. First, are the causes of action as pleaded in the petition and consequential remedies sought capable of surviving the petitioner? Second does the applicant as an interested party have the capacity to continue with litigation commenced by the petitioner in its capacity as an interested party?

(a) are the cause of action and remedies sought capable of surviving the deceased petitioner?

In the petition dated 5th November 2014 the petitioner sought the following salient orders:-

(i) A declaration that the actions of the 1st, 2nd, 3rd, 4th, 5th, and 6th respondents herein jointly and severally in failing to apply proper financial management systems in the management of the funds and properties of the Central Organization of Trade Unions (Kenya) in accordance with the provisions of the law is in violation of the Constitutional Rights of the Petitioner held in common with the members of the Bakery, Confectionery, Food Manufacturing and Allied Workers Union (Kenya) as provided for under Articles 36, 40, and 41 of the Constitution of the Republic of Kenya.

(ii) A declaration that the actions of the 1st, 2nd, 3rd, 4th, 5th and 6th respondents herein jointly and severally in failing to apply proper financial management systems in the management of funds and properties of the Central Organization of Trade Unions (Kenya) in accordance with the provisions of the law is in violation of Articles 10 of the Constitution which enjoins the 1st, 2nd, 3rd, 4th, 5th, and 6th respondents herein jointly and severally in failing to apply proper financial management systems in the management of the funds and properties of the Central Organization of Trade Unions (Kenya) in accordance with the provisions of the law is in violation of Article 10 of the constitution which enjoins the 1st, 2nd, 3rd, 4th, 5th and 6th respondents to apply the national values and principles of governance, accountability, transparency and integrity.

(iii) A declaration that the 1st, 2nd, 3rd, 4th, 5th, and 6th Respondents herein jointly and severally be declared unfit to hold office as the Secretary, General, Chairman General, Treasurer General, 1st

Singing Trustee, 2nd Trustee and 3rd Trustee respectively of the Central Organization of Trade Union (K) and that they be removed from such officers forthwith.

(iv) A declaration that the 1st, 2nd, 3rd, 4th, 5th, and 6th respondents herein jointly and severally be declared unfit to hold office as trade union officials of any registered trade union in the Republic of Kenya and that they be removed from such offices forthwith.

(v) A mandatory order of injunction directed to the 7th respondent herein directing her to forthwith inspect all the record and bank accounts of the Central Organization of Trade Unions (Kenya) (COTU) and to conduct or cause to be conducted a forensic audit into such bank accounts mentioned under order 6(a) to (o) above and all the payment vouchers, authorization of deposits, withdrawals and all incidental financial records authorization of deposits, withdrawals and all incidental financial records, project work plans, and all incidental transactions of COTU and to forthwith submit a report to this Honourable Court within such time as the Court may deem fit to direct and upon furnishing of such Audit Report the Petitioner herein be at liberty to seek further orders and directions in respect of the same.

(vi) A mandatory order of injunction directed to the 1st, 2nd, 3rd and 4th interested parties jointly and severally compelling them to immediately freeze COTU Bank Accounts (b) to (o) above until such time when the forensic audit sought for herein is concluded and a report thereon submitted to this Honourable Court so as to determine what further orders and directions to issue on the same.

(vii) An order directed to the 9th interested party requiring that operations of its General Fund Account, A/C No. 1108987486 held at Kenya Commercial Bank, Moi Avenue Branch Nairobi do continue subject to conformity with the provisions of the Labour Relations Act, 2007 particularly Part V thereof, the Constitution and Rules of COTU and the Trade Unions (Accounts) Regulations.

(viii) A mandatory order of injunction directed to the 1st, 2nd, 3rd, 4th, 5th, and 6th respondents herein jointly and severally compelling them to forthwith deliver and pay to the Central Organizations of Trade Unions (Kenya) any monies and funds of the Central Organizations of Trade Unions (k) that may have unlawfully expended, misappropriated and/or unaccounted for under their watch with immediate effect upon the conclusion of the forensic audit sought for herein and a report submitted to this Honourable Court.

(ix) A mandatory order of injunction directed to the 1st, 2nd, 3rd, 4th, 5th, and 6th, respondents herein jointly and severally compelling them to disclose particulars of all immovable properties either owned or used to be owned by the 9th interested party in Kakamega, Nakuru or any other part in Kenya whether registered in the name of the said interested party or transferred to other parties.

(x) A mandatory order of injunction directed to the 8th respondent compelling him to furnish the Court with any consents, authorization and any Gazette Notices sanctioning the transfer of any immovable properties of the Central Organization of Trade Unions (Kenya) in any part of Kenya as contemplated under section 37(2) of the Labour Relations Act, 2007 and upon production of the same the Petitioner be at liberty to seek further orders from this Honourable Court.

(xi) A mandatory order of injunction compelling the 1st, 2nd, 3rd, 4th, 5th, and 6th, respondents to account for any assets of the Central Organization of Trade Unions (Kenya) at Mombasa Workers Tailoring Institute that may have been lawfully, unlawfully or illegally disposed off and to pay back sums equivalent to the market value of the said properties to the Central Organization of Trade Union (Kenya).

(xii) An order directing the 7th and 8th interested parties herein, to forthwith commence Criminal Investigations with a view of prosecuting any person including the 1st, 2nd, 3rd, 4th, 5th and 6th respondents for any disclosed culpable offences known to law in respect of any unlawful

expenditure and/or misappropriation of any funds, monies and property of the Central Organization of Trade Unions (Kenya).

21. The essence of the orders sought by the deceased Petitioner could be said to revolve around forensic audit of the financial affairs and general operations of the 9th interested party which the petitioner felt were not being run or conducted in accordance with 9th interested party's constitution, the Labour Relations Act and proper financial procedures. The petitioner in essence therefore, sought through the Petition, Orders which if granted would lead an indepth financial and property audit of the 9th interested party and if any malpractices or malfeasance is established the named respondents be held responsible and appropriate sanctions meted against them.

22. At paragraph 5 of the petition the deceased Petitioner stated that he brought the Petition in his capacity as a member of the Governing Council of COTU and on behalf of the members of the Bakery, Confectionary, Food Manufacturing and Allied Workers Union (BCFMAWU) as paid up subscribers to COTU. Further, as the Deputy Secretary General of COTU and General Secretary of Bakery, Confectionary, Food Manufacturing and Allied Workers Union.

23. It therefore emerges that the concerns raised by the petitioner were those concerns he interacted with in his official capacity as Deputy Secretary General of COTU and General Secretary of Bakery, Confectionary, Food Manufacturing and Allied Workers Union. These positions were elective and he could cease holding the same in accordance with Unions' respective constitutions or unfortunately by death as the case here.

24. Section 2(1) of the Law Reform Act provides that:-

2(1) subject to the provisions of this section, on the death of any person after the commencement of this Act, all causes of action subsisting against or vested in him shall survive against or as the case may be for the benefit of his estate.

25. The wrongs complained of in the Petition if proved and remedied would benefit the 9th interested party and members of Bakery, Confectionary, Food Manufacturing Workers Union on whose behalf the deceased petitioner alleged he commenced the petition. Bakery, Confectionary, Food Manufacturing Workers Union however as a union is a corporate body capable of suing in its own name hence this allegation by the Petitioner may ultimately turn out not to be sound in law. No personal benefit capable of transmission to the estate of the deceased is discernible from the prayers sought in the petition.

26. In the circumstances, the alleged causes of action as pleaded in the petition subsisted and vested on the petitioner in his official capacity as the Deputy Secretary General of COTU and General Secretary of Bakery, Confectionary, Food Manufacturing and Allied Workers Union which positions were co-terminus with procedural removal or death of the holder. No action or litigation initiated in such capacity can survive the office holder for it to be continued for the benefit of such person's estate. None of the prayers sought in the petition seeks any compensatory order or damages personal to the deceased petitioner which his estate could continue to pursue for its benefit. The Court therefore finds that the petition as filed is incapable of continuing to be prosecuted as no benefit to the deceased estate would be yielded therefrom.

(b) Does the applicant as an interested party have the capacity to continue with litigation commenced by the petitioner in its capacity as an interested party.

27. The Court has found as above that the complaints and remedies sought in the petition were agitated for by the deceased petitioner in his official roles. Nothing in them could be bequeathed to his estate. The applicant herein has not alleged and has not shown that it is the deceased's legal representative in order to continue with any litigation commenced by the deceased petitioner.

28. The applicant herein joined in these proceeds on the ground that it was an affiliate of the 9th interested party whose employees are its members and further that the orders sought in the petition related to the

auditing and interrogation of the affairs of the 7th respondent. According to the applicant, the petition was of great public interest and directly affected its membership.

29. The role of an interested party in any proceedings is usually borne out of the fact that the issues raised in the litigation are issues of public significance that go beyond the interest of the parties involved. The interested party therefore because of its/his specialist knowledge about how the decision may impact upon the group it/he represents, have the ability to make informed submissions that could assist the Court. Interventions by interested parties are therefore methods by which persons or organizations not otherwise involved in the litigation may submit specialist information or expertise to the Court.

30. According to the Public Law Project of the United Kingdom, the cost position for interested parties is less forward but the general rule is that an unsuccessful claimant will only be liable for one set of costs, with an order in favour of an interested party being made only in exceptional cases since in most cases the participation of the interested party was essential to the resolution of the case. Equally, a costs order against the interested party are also rare.

31. From the foregoing, it is deducible that the role of an interested party is to assist the Court by offering a perspective or drawing a focus to the dispute which the parties may not be able to. The interested party's intervention may assist the Court while deciding the dispute interpartes not to lose sight of the impact the decision might have on the interest or groups represented by the interested party. The role of an interested party is not therefore that of a cheer leader or a supporter.

32. The applicant's intention as expressed in the application is to continue with the petition as filed by the deceased petitioner because the petition related to the auditing and interrogation of the affairs of the 7th respondent which according to the applicant were matters of great public interest.

33. The applicant however, is neither a legal representative of the deceased nor a co-petitioner in the petition but simply an interested party. As observed above the role of an interested party is usually to introduce a perspective to the dispute which would assist the Court in deciding the dispute before it in a way that does not overlook or disregard the interest represented by the interested party.

34. The applicant would appear to want to use the hat of an "interested party" to continue a litigation not commenced by it. If the issue raised by the deceased petitioner directly affected or concerned the applicant nothing prevented it from applying to be joined as a co-petitioner at the appropriate time. The applicant instead chose to be joined as an interested party. As already pointed out above, the role of the interested party is specific and limited and can only continue as long as the litigation concerned is alive.

35. The Petition herein was brought to an unfortunate end by the death of the petitioner and the issues raised therein by him were in his capacity as an official of COTU(K) and Bakery, Confectionery, Food Manufacturing and Allied Workers Union. These concerns were not for the benefit of his estate hence cannot be said to have survived him. In the circumstances if the applicant feels the concerns raised by the deceased's petitioner are of concern to it as well, nothing prevents it from filing a fresh petition.

36. The application is therefore dismissed with costs.

37. It is so ordered.

Dated at Nairobi this 18th day of August 2016

Abuodha Jorum Nelson

Judge

Delivered this 18th day of August 2016

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha Jorum Nelson

Judge