



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1265 OF 2014

STEPHEN MUTWIWA MASIKA..... 1ST CLAIMANT

JAMES NJIHIA..... 2ND CLAIMANT

SIMON KIGALU..... 3RD CLAIMANT

TRANSPORT WORKERS' UNION (KENYA)..... 4TH CLAIMANT

VERSUS

TITUS W KHAEMBA 1ST RESPONDENT

REGISTRAR OF TRADE UNION 2ND RESPONDENT

RULING

1. On 16th October 2014 the claimants filed application through Notice of Motion under section 3 and 12 of the Industrial Court Act seeking for orders;

- a. *That... [Spent]*
- b. *That this honourable Court be pleased to make an [order] directing the officials of 3rd Applicant [claimant] to immediately hold an election within the next 5 days to fill the position of the General Secretary who died on 16th August 2014 and was buried on 31st August 2014.*
- c. *That this honourable Court be pleased to make an orders appointing a neutral and accredited government officer/Labour Officer from the Ministry of Labour to supervise the said election and the same be held at the Union offices at the NACICO Plaza, 4th floor, room 407 Nairobi being the headquarters of the Union.*
- d. *That any election previously held by the team headed by the Respondent and the team comprising the 1st and 2nd applicants be nullified and the officials of the 3rd applicant be ordered to immediately hold an election within the next 5 days to fill the position of the General Secretary*
- e. *That the costs of this application be in the cause.*

2. This application is supported by the annexed affidavit of Stephen Mutwiwa Masika, the national chairman of the 3rd applicant union. The application is also based on the grounds that the 1st and 2nd applicants are the national chairman and treasurer on the 3rd applicant respectively, which positions they have held for over ten years. The General Secretary of the Union died on 16th August 2014 and on 5th

September 2014 the 1st Respondent obtained an order stopping any withdrawals from the Union account and also sought for orders that he be appointed the General Secretary of the Union which prayer was rejected by the Court on 7th October 2014. Other grounds are that on 15th September 2014, members of the Central Council asked the 1st respondent, the Deputy General Secretary of the Union to convene a meeting to fill the vacant position of the General Secretary which he refused and the members then appointed Dan Mihadi on 24th September to convene a Central Council meeting. Dan Mihadi fixed a meeting of the Central Council on 1st October 2014 at the Union head office for the purpose of filling the vacant position of the General Secretary and notice was served on all concerned inclusive of the 1st respondent. A copy of the notice for the meeting was sent to the 2nd respondent, the Registrar of Trade Unions on 26th September 2014. Upon service of notice for a meeting upon the 1st respondent, he issued a parallel letter dated 29th September 2014 directing that a meeting be held at Central Organisation of Trade unions headquarters (COTU), yet the elections had nothing to do with COTU.

3. Other grounds in support of the application are that as the 1st applicant, he wrote to the 1st Respondent noting that the Central Council meeting had to be held at the Union head office and not at COTU offices. On 1st October 2014, the Central Council met and elected/appointed Dan Mihadi as the new General Secretary and together with the minutes of the meeting forwarded the same to the 2nd Respondent for change of officials.

4. On 7th October 2014, the Court directed the Union to hold elections to fill the vacant position but the 1st Respondent does not want to participate in a free and fair election, and now hiding behind COTU officials to install him into the post of General Secretary without elections. The 1st Respondent has already moved the Court to freeze the Union accounts and to have himself appointed as a signatory to the account which the Court declined. He is now bringing confusion in the Union to frustrate the operations in order to usurp the position of General Secretary without due process.

5. In the affidavit of the 1st applicant Stephen Mutwiwa Masika, he supports the application and the grounds thereto and states that as the national chairman of the Union he has authority to make the affidavit for the applicants and in support of the application. On 7th October 2014 the Court directed parties to fill in the vacant position of the General Secretary but the 1st Respondent is not keen to address the same despite efforts by the applications to convene a meeting and appoint/elect a General Secretary and filling returns with the 2nd respondent. that there are now two parallel teams following the meetings held on 1st October 2014 where the applicants appointed the General Secretary while the 2nd Respondent has registered the 1st Respondent as the acting General Secretary contrary to the law and constitution of the union.

6. He further depones that there are interim orders herein that have stopped withdrawals from the Union account which has now stalled operations of the union. The application should be allowed to meet the ends of justice.

7. In reply, the 1st Respondent filed a Replying Affidavit on 31st October 2014. This affidavit though commissioned is not dated.

8. The undated affidavit of the 1st Respondent notwithstanding, his Advocate went on to submit that the 1st Claimant as the deponent and person given authority by the 2nd Claimant to support the application herein is not in law the right person to act for the Union [4th claimant] and hence the application before Court is of no consequence. As the National Chairman of the Union, the 1st Claimant has no authority whatsoever to swear affidavits on behalf of the union. The 3rd claimant, now deceased has been omitted from the application herein mischievously as this is without leave of court. Section 2 of the Labour Relations Act defines the authorised officer of a trade Union is being the General Secretary.

9. Counsel also submitted that under the Union constitution at rule 15 (e), the 1st Respondent is

mandated to exercise all rights and powers of the General Secretary in the absence of the General Secretary. The 1st Respondent was granted orders to be included as a bank signatory and not to be General Secretary which was pursuant to the Union constitution. As the Deputy General Secretary acting in the absence of the General Secretary, he has never been asked to convene the Central Council meeting and was never served with any notice for a meeting. The notice issued on 29th September 2014 seeking to convene a Central Council meeting on 1st October 2014 was revoked and whatever elections were held were nullified by the 2nd Respondent – Registrar of Trade unions. The 1st Claimant as national chairman has no capacity to convene a meeting; he can only chair it once the 1st Respondent has done so.

Determination

10. I start with the 1st Respondent's Replying Affidavit filed on 31st July 2014. As noted above, this affidavit is undated. The respondent's counsel submitted that this is a technicality that the Court should ignore and address the substantive issues herein as provided by article 159 of the Constitution. These submissions arose out of the court, on its own motion moving the 1st Respondent advocate to address the same. From the submissions with regard to this affidavit, I have taken time to go through the entire record and noted various anomalies with the affidavit, not just the undated fact but also the signatures of the deponent therein. I have looked at all the affidavits sworn by the 1st Respondent;

Replying Affidavit sworn and dated 12th August 2014;

Supporting Affidavit sworn and dated 4th September 2014;

Supporting affidavit sworn and dated 23rd December 2014;

Further affidavit sworn and dated 16th February 2015; and

The subject Replying Affidavit filed on 31st October 2014.

11. All these affidavits herein as sworn by the 1st respondent. They all bear different signatures. With a bear look and without any technical support, these are either not done by the deponent or done by somebody else other than the supposed deponent. This arises from the undated affidavit that now looked at as against these other differences, create disparity that does not only touch on 23 a technical issue but challenge the authenticity of the entire record filed by the 1st respondent. This is not an issue that can be cured by the application of article 159 of the constitution however much the Court wishes to address substantive issues herein. On the court's own motion, counsel for the 1st respondent, failed to address the issue directly and opted to divert Court through the application of article 159. This is not what the Court would find as diligent and in good faith on the face of a serious anomaly on a matter regulated by law, the Oaths and Statutory Declarations Act. All affidavit should be dated, signed and place of such dating and signing indicated. These are mandatory provisions and not left to the Court discretion as held in **Solomon Software (EA) Ltd et al versus Microsoft Corporations t/a Great Palins Business Solutions [2002] 2 KLR**. Article 159 of the constitution does not repeal written law unless stated so. The applicable law with regard to making of affidavits unless otherwise repealed require all parties to follow the outlined provisions without deviation. Had the constitution intended to oust such a law, nothing was easier than to do so. In this case, I find a fundamental flaw with regard to the 1st respondent's affidavit. This affidavit filed on 31st October 2014 is expunged from the record.

2. The 2nd Respondent has not entered appearance herein despite being served and notice of suit being issued. The 2nd Respondent has however continued to act outside of Court and make directives, receive submissions from parties herein in utter disregard of the Court process. This is absurd, as a party duly served and who fails to enter appearance and make necessary submission through the judicial process, to continue to act outside the Court in a manner as herein done by the 2nd Respondent is utter contempt of court. The directives, orders and subsequent implications of any such actions outside the

Court process, should equally be treated with disregard and by reliance of such actions by the Court would be to sanction impunity, allow illegitimate processes and leave the Court exposed to ridicule and the orders issued open to wanton abuse

13. The basis of the claimants application is that the Court should direct the Union to hold elections of the General secretary; appoint a neutral and accredited officer to supervise the election; and any election previously held be nullified.

14. Another issue that arose in the submissions of the parties herein is who should represent the Union interests such as file suit herein. The 1st Respondent Counsel was emphatic in his submissions that the 1st Respondent is the authorised officer of the Union and the 1st Claimant has no authority to represent the Union apart from chairing meetings once convened by him. Also that the 1st Claimant cannot call for meetings or issue notices for and on behalf of the Union or swear an affidavit for the Union as to do so would be a nullity as he is not the authorised officer.

5. As submitted by the 1st Respondent and I agree, section 2 of the Labour Relations Act, and define the ‘authorised officer’ of the trade Union as the General Secretary. This is as held by this Court in **William Opondo and Others versus David Muli and Others, Cause No. 1419 of 2014** where the Court held;

... under the Labour Relations Act there is a clear distinction between who a trade Union officials and officers are. This distinction is important to revisit. Section 2 of the Labour Relations Act stipulates as follows;

“Officer” when used with reference to a trade Union or employers’ organisation, means a person employed by that trade Union or employers’ organisation;

“Official” when used with reference to a trade Union or employers’ organisation, means a duly elected official of a trade Union or employers’ organisation including a member of the executive and a branch

Officials are elected while officers are employees. The elected official has a specific mandate for and on behalf of the Union members and this cannot be negated by provisional measures made by any officer employed for the purpose of implementing decisions of officials charged with policy and oversight mandate over the union.

16. in the case of **Jophinus Musundi and Others versus Seth Panyako, Cause No. 866 of 2014**, the Court went further and held;

... an official and who an officer is also given emphasis by the Act as an official has statutory duties they must perform;

2. In this Act, unless the context otherwise requires -

“Authorised representative” means –

(a) The General Secretary of a trade union;

...

(e) Any person appointed in writing by an authorised representative to perform the

Functions of the authorised representative.

17. With this outline, it is clear who the ‘authorised officer’ of a Union is. But here we have a dispute

that relate to Union officials as elected all under the same union, on the one hand the Deputy General Secretary and on the other, the Chairman, Treasurer who act together with the Union as the 4th Claimant noting the demise of the 3rd Claimant, General Secretary whose position is now subject of the application herein. Should the Court ignore such suits filed by Union officials who are not the ‘authorised officer’? noting the decisions cited above the issues that arose therein, this case relate to an election with regard to the office of the ‘authorised officer’ the General Secretary who is deceased. In such matters, the jurisdiction of the Court is invoked.

18. Section 12 (1) (i) of the Industrial Court Act, make provision that;

12. (1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—

...

(i) disputes concerning the registration and election of trade Union officials.

19. Any dispute that relate to trade unions on matters of elections, the Court has the requisite power to address such matters. Such matters can be filed by a member of a trade Union as under section 12(1)(g), a member who may be an official or not, such a member is not restricted to the ‘authorised officer’ but open where matters election and registration of unions are concerned. Such law I find is meant to address a situation like this case, where on the one hand the General Secretary is absent and the replacement of such an official is contested. Thus the claimants should have filed the suit in their own capacity as members of the Union as to act for and on behalf of the Union as national officials is regulated by law.

20. With that outline, in this case, both parties admit that the General Secretary of the Union is deceased which arose during the pendency of the matter before Court on 16th August 2014. I also find both parties are agreed to a large extent that there is a Union constitution that governs the situation as to what should be done once a national official is deceased, absent, resigns or is removed from office for whatever reason before his or her term comes to an end. and the applicable law in regard to matters herein is the Labour Relations Act. That far all parties are agreed. What is contested is that the 1st Claimant has acted outside his mandate on the one hand and on the other part, the 1st Respondent has been appointed as acting General Secretary unprocedural and been allocated an office that does not exist under the Union constitution or in law and this has been done in collusion with the 2nd respondent.

21. As the Court addresses this matter, what is apparent and standing out is that the position of General Secretary is vacant, both parties, the claimants and the 1st Respondent has made efforts to fill in this position one way or the other but this has ended up splitting the Union further apart. What is also apparent is that when the Court made a ruling on 7th October 2014, both parties herein had already commenced efforts to fill in the position of General Secretary in earnest but none was candid to disclose these efforts, the ruling of the Court notwithstanding.

22. While the claimants application dated 16th September 2014 was pending, which application seek orders that elections of the Union be held, they did move the Central Council and conducted an election/appointment of Dan Mihadi as the General Secretary. Equally while the 1st respondent’s application dated 4th September 2014 was pending for hearing, he moved the 2nd Respondent to be appointed as acting General Secretary. In essence, the ruling of the Court on 7th October 2014 and the orders therein were inconsequential and none of the parties herein, while making submissions with regard to the claimant’s application now dated 16th September 2014 have addressed themselves to the process outlined by the Court with regard to the orders issued therein in their entirety. What each party is keen to address is who should be the General secretary. As of 7th October 2014 when the Court was busy giving directions herein, each party was already aware of who their General Secretary is. This state of affairs is

absurd and should come to an immediate stop. This is not the purpose of unionisation, to come to Court when it suits you best and to choose which orders to follow and when the orders given are not favourable to your interest, these are discarded and new orders sought. This is not the purpose of this court. To keep churning orders which are not followed.

23. When the claimants came to Court on 31st July 2014, there were valid grounds as outlined in their application and Notice of Motion. There is a Memoranda of Claim. Hence in the ruling of the Court of 7th October 2014, even where the Court directed parties to move with haste and address the issue of the absence of the 3rd claimant, the General Secretary, there was the order directing the claimants to take hearing dates for the main cause to address the issue of who the General Secretary was to be and the signatories of the bank accounts, then all issues would effectively be addressed. Since filing of the claim, the 3rd Claimant has since died and this should be formally addressed.

24. It is no wonder then; all parties are now to one issue – the vacant office of General Secretary. This the Court directed on 7th October 2014.

25. It is in the interests of justice that this position be filled at the earliest. This should have in any even been filled by now, had both parties been keen to follow directions and orders of the Court on 7th October 2014. But as noted above, none of the parties are innocent. As the Court was busy giving its orders, all knew who their General Secretary was!

26. This should not be let to happen as there is a Union and members who require service and support. All this has also been done under the hand and knowledge of the 2nd Respondent, the Registrar of Trade Unions.

27. The ruling of the Court on 7th October 2014 addressed the issue of rule 15(e) of the Union constitution. For the 1st Respondent counsel to take the Court back to the same herein I find to be in bad faith and only meant at diverting attention to matters already arbitrated upon.

28. Section 34 of the Labour Relations Act makes provision on how a Union such as the 4th claimant, Transport Workers' Union (Kenya) should be held;

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

29. Rule 14 of the Union constitution outlines the national officers – this does not include an acting General Secretary as this office can be filled as under Rule 14(c) by a person who is not a member of the union, a person not engaged in a sector with which the Union is directly concerned subject to permission from the Registrar of Trade Unions as under the provisions of the Labour Relations Act. Rule 14(h) make provision that where more than 3 national officers of the Union dies, resign or are dismissed, a special conference *shall be convened* as under Rule 10 to fill the vacancies. Rule 14(h) does not address what should happen in the event less than 3 national officers of the Union die, resign or are dismissed. my reading of the entire Rule 14 is that all national officers of the Union are elected, at the Delegates Conference and where there is a vacant position, the Central Council has power to appoint one of its members to fill a vacancy so created creating an exception where more than 3 national officers require to be filled, then rule 14(h) apply. Therefore, the Central Council, being the body given special mandate at the Delegates Conference to run the affairs of the Union for a period of 5 years, is the governing body of the union. the Central Council comprise;

- a. national chairman,
- b. two vice national chairmen,
- c. General secretary,

- d. deputy General secretary,
- e. 2 assistants General secretaries,
- f. national treasurer,
- g. assistant national treasurer,
- h. three trustees, and
- i. every branch secretary.

30. with a quorum of one-third, the Central Council has power to fill any vacant position. Of paramount importance is Rule 12 (e);

... between meetings of the Delegates Conference, the Central Council shall interpret the rules, when necessary, and determine any point on which the rules are silent.

31. This is a power given by the Union constitution and should apply in a case like this one where the General Secretary is deceased, there is no provision for acting General Secretary and a vacancy has arisen, that of the General Secretary and require to be filled.

32. It is apparent from the application now before court, and subsequent applications now on file particularly with regard to the use and management of Union resources, the position of the General Secretary should have a substantive holder as there is no provision of an acting General Secretary nor is there agreement by the parties here on the applicable process. in the interests of justice, and based on the application now before court, I find merit in the same to the extent that a new election has to be called for; a neutral person shall supervise the same and the election previously held by the respondents and the claimants/applicants herein be nullified and new General Secretary be appointed to take the substantive duties of the officer.

33. Such orders cannot work in a vacuum. A convening of the Central Council is required upon reasonable notice by the Deputy General Secretary and upon convening of such meeting the national Chairman shall preside. At the convened meeting, the substantive agenda shall be the filling of the General Secretary office. Noting events gone by a neutral/independent/impartial party shall be present to supervise such filling of the General Secretary office. Noting the role the 2nd Respondent herein has played outside of these proceedings, that office shall only receive the convened meeting returns as under the Labour Relations Act. The matter is now seized by the Court and shall be presided over by an officer of the Court as outlined in this ruling.

The application dated 16th October 2014 shall not be allowed. Further noting the orders herein on 7th October 2014 Court orders as follows;

- a. **the Claimants shall in 14 days formally address the issue of 3rd Claimant (now deceased) during the pendency of the Claim;**
- b. **both parties [the claimants herein and the 1st Respondent] shall within 7 days appoint a person of their choice to be present at the convened meeting;**
- c. **the 1st Respondent shall within 7 days issue notice to the Central Council for a meeting that shall be held within the next 21 days with the sole agenda of appointing/electing a General Secretary of the Union; such notice shall be copied to persons appointed at (b) above and to the 2nd Respondent;**
- d. **the convened meeting as (c) above shall be at the Union registered offices;**
- e. **Based on (b), (d) and (g), remuneration of these persons/officers and funds required for purpose of the convened meeting shall be drawn from the Union accounts;**
- f. **All notices above shall be copied to the court;**
- g. **Present at the convened meeting above shall be the Court Deputy Registrar;**
- h. **The Court reiterates the suit herein raises weighty issues; the same should be fixed for hearing.**

Delivered in Open Court at Nairobi this 24th Day of February 2015.

M. Mbaru

JUDGE

In the presence of:

Lilian Njenga: Court Assistant

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