



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATION COURT OF KENYA

AT MOMBASA

CAUSE NO. 48 OF 2014

1) RAPHAEL OTIENO ODUMO

2) JOSEPH WANYAMA

3) DAKTARI MWAYAYA.....CLAIMANTS

VERSUS

1) CHARLES NATILI

2) SIMON EGESA

3) JOAN MURAYA

4) SAUL NGATIA

5) JOHN MABIRA

6) KENYA ENGINEERING WORKERS' UNION..... RESPONDENTS

J U D G M E N T

INTRODUCTION

1. This is a suit about dissolution of a branch of a trade union and creation of 3 other branches in the same area by the National Executive Committee (NEC) of the union. The suit is brought by the elected officials of the dissolved Branch seeking, majorly, the reinstatement of the branch. The main ground upon which the suit stands is that the dissolution of the branch was done unlawfully and in breach of constitution, union constitution, statute law and the Rules of natural justice.

2. The respondents have denied all the allegations in the suit and maintained that the NEC acted within the unions constitution in creating more branches of the union.

BACKGROUND

3. The Mombasa branch of the union has been involved in leadership wrangles pitting the claimants herein and the 4th and 5th respondents. The wrangles were resolved by this court through its judgment delivered on 26.8.2013 by which fresh elections were called. The claimants were elected but the 4th and

5th respondent, lost the election and refused to vacate the offices in favour of the new team. As a result the claimants brought new suit ICC NO. 439 of 2013 to force the former officials out of the office. In the meantime the NEC registered 3 new branches of the union within the jurisdiction of the Mombasa branch and transferred all members of the Mombasa branch including the claimants to the respective new branches. According to the claimants the transfer of membership was without consent, contrary to the law and the union constitution and intended to defeat the election of the officials of the Mombasa branch.

4. As a result, the claimants brought this suit to stay the operation of the newly formed branches until the expiry of the term of office of the elected officials of the Mombasa branch. In reaction to this suit the NEC allegedly dissolved the Mombasa branch prompting the claimants to amend the suit in order to pray for reinstatement of the branch in addition to the other reliefs earlier sought. The respondent did not amend their defence to oppose the new reliefs sought.

5. On 9.6.2014, the claimants moved the court *vide* Notice of Motion dated 9.6.2014 and got interim order staying the dissolution of the Mombasa branch and directing that the Branch office to remain open under the control of the claimants as the elected officials. The said orders were confirmed by consent of counsel for both sides on 24.6.2014 when the motion came up for *inter partes* hearing. The main suit was then heard on 17.7.2014 and 18.12.2014 when the first claimant testified as CW1 while 1st Respondent testified for the defence as RW1. Thereafter counsel for both sides filed written submissions.

CLAIMANT'S CASE

6. CW1 is the elected Branch Secretary while the second and third claimants are the Branch chairman and Branch Treasurer of the Mombasa branch of the union respectively. CW1 contended that his branch has been frustrated by unprocedural and illegal dissolution of his branch and creation of new branches within the jurisdiction of the Mombasa branch. He explained that after being elected to the office, the 1st respondent never went to oversee the handing over but had resulted to denying the branch funds. In addition, 1st respondent has since appointed the 4th respondent as the Area Secretary Coast Region after losing the elections to the claimants. The 1st respondent further wrote to all the employers in the region on 24.1.2014 advising them not to deal with the Mombasa Branch official and instead deal with the 4th respondent. The 1st respondent again wrote to all employers on 29.1.2014 telling them the 5th Respondent was the appointed Disputes Officer in the region.

7. According to CW1 the 4th and 5th respondent have effectively usurped the powers of the Mombasa branch committee even after being voted out. CW1 maintains that all the said correspondence, dissolution of their branch and the creation of the new branches were done secretly and without prior consultations with their branch. The claimant learnt the new appointment of the 4th and 5th respondents and also about the new branches when they went to represent workers in their work place. The Mombasa branch has no representative in the NEC. CW1 maintained that the new branch should have been created at the end of the term for the Mombasa branch committee.

8. He prayed for declaration as illegal, the creation of the new branches and the transfer of members and in the alternative he prayed for stay of the new branches until next election in 2016. He also prayed for declaration as illegal the dissolution of Mombasa branch and prayed for its reinstatement. He further prayed for injunction to restrain the 4th and 5th respondent from interfering with the affairs and activities of Mombasa branch. Lastly he prayed that the elected officials of Mombasa branch be the ones in charge of the affairs and activities of the branch.

9. On Cross examination by the defence counsel, CW1 stated that his main prayer in this suit is the reinstatement of the Mombasa branch and funding from the union. He admitted that under rule 15 of the union constitution, only the NEC which has the mandate to create branches. He however contended that the other branches should be consulted. He maintained that a branch should have a minimum of 20 members. He stated that Mombasa branch has 3700 Members. He admitted that the claimants were part-time workers as the branch officials while the area Secretary does the day today management. He contended that the area Secretary is supposed to be appointed by the branch Executive committee in

consultation with the NEC under section 11 of the union Constitution. CW1 confirmed that Mombasa branch covered Mariakani and Kikambala. CW1's was transferred to Mazeras branch.

DEFENCE CASE.

10. RW1 (Charles Natili Wekesa) is the General Secretary for the Union based in Nairobi. He contended that the NEC found that members from Mariakani were finding access to Mombasa office inconvenient and created 3 other branches namely Changamwe, Mazeras and Mvita. The NEC acted under rule 7 of the union constitution in creating the new branches. He denied that the NEC has any obligation of consulting the other existing branches when creating new branches. He maintained that the NEC has a discretion for creating new branches and denied that NEC breached the union constitution. He contended that Mombasa branch ceased to exist from 18.1.2014 and its officials should have sought fresh mandate in the new branches.

11. On cross examination by the claimant's counsel, RW1 maintained that Mombasa branch was dissolved on 18.1.2014 and not 3.5.2014 as per the letter by the Registrar of trade unions (RTU) dated 15.5.2014. He contended that the dissolution was prompted by complaints by members about the distance to Mombasa office from their work place. He further contended that Mombasa branch has representatives in the NEC including Mr. Mweru (Union Vice Chairman) and Mr. Mlati (NEC member). He admitted that the union was not funding the Mombasa branch because it ceased to exist. He denied knowledge of any court orders which allowed Mombasa branch to continue operating. He admitted that the new branches never elected any officials but the NEC nominated them. He concluded by saying that Mombasa branch was dissolved under rule 17A of the union constitution.

ANALYSIS AND DETERMINATION

12. After considering the pleadings evidence and submissions, it is clear that the claimants are the duly elected officials of Mombasa branch of the union. There is no dispute that the NEC of the union created 3 new branches called Mazeras, Changamwe and Mvita and allegedly dissolved the Mombasa branch without consulting the claimants. There is further no dispute that the mandate of creating branches of the union rests with the NEC. Lastly there is no dispute that no election of officials have been done by the new branches. The issues for determination are:

- (a) Whether the creation of the 3 new branches and dissolution of Mombasa branch were unconstitutional, unlawful and unfair.
- (b) Whether the reliefs sought should issue.

CREATION AND DISOLUTION OF THE BRANCHES.

13. Under rule 15 of the Union Constitution, the power to establish, suspend and disband branches of the union rests with the NEC. Under the said rule, a branch of the union must have at least 20 members to exist. In this case the 3 branches were carved from Mombasa branch by NEC resolution in a meeting held on 18.1.2014 and registered by the Registrar of Trade Unions (RTU) on 21.1.2014. The reason cited for creating the new branches was to bring officers close to the members. However no requests for such near offices or complaints about distance from Mombasa office by members was produced as exhibits in this suit. The court will however not go down that road because it has not been invited to determine the merits of such branches. Suffice it to say that the NEC exercised its mandate under rule 15 of the union constitution to create the 3 new branches. The union constitution does not provide for the procedure to be followed in creating new branches. It was not denied that the per branches have over 20 members. Consequently the branches were properly created within the meaning of rule 15 of the Union Constitution.

14. On the other hand the court finds that the Mombasa branch was unlawfully dissolved. The only evidence of the dissolution is the letter from the RTU dated 15.5.2014 which confirmed the Registration of the dissolution of the branch by NEC on 3.5.2014. No minutes of the NEC meeting of 3.5.2014 was

produced as evidence in this case. In addition RW1 in his testimony maintained that the dissolution of Mombasa branch was done by the NEC on 18.1.2014 when the new branches were created. The NEC minutes dated 18.1.104 however do not support the testimony by the RW1. The court therefore finds on a balance of probability that the NEC never passed any resolution for the dissolution of Mombasa branch and that the RTU only acted on false allegation by the RW1 contained in his letter dated 5.5.2014 to requesting for the dissolution of the Mombasa branch. The dissolution was therefore unlawful and in contravention of Rule 15 of the union constitution.

15. Even there was a resolution by NEC, which was not there, the dissolution would still be unconstitutional for breach of the rules of natural justice which bars condemnation before hearing. The decision to dissolve the branch was too drastic and was not preceded by any consultation between the NEC and the claimants who were the elected officials of the branch. The result was to curtail their Mandate before the due time and transfer to them to the newly created branches without their consent. The answer to the first issue for determination is therefore that, even if the NEC had lawfully created the 3 new branches, the dissolution of Mombasa branch and the transfer of members to the new branches was unfair, unlawful and unconstitutional for breach of the union constitution and the Rules of National justice.

RELIEFS.

16. In view of all the finding above the court declares the dissolution of Mombasa branch of the union unfair, unprocedural and contrary to the union constitution and principles of natural justice. Consequently the Mombasa branch of the Kenya Engineering Workers Union is reinstated forth within. In so holding, the court is alive to the fact that the parties to this suit recorded a consent staying the dissolution of the said branch on 24.6.2014 pending the determining of this suit. CW1 in his evidence asked the court to suspend the newly created branches until 2016 when new branch elections will be done after expiry of their term. That sounds reasonable especially because RW1 confirmed that no elections of new official were done in respect of the new branches created. Consequently the court hereby suspends the operations of the newly created Mazeras branch, Changamwe branch and Mvita branch of the 6th Respondent until 2016 when the term of the elected officials of Mombasa branch lapses. That way there will be no conflict and confusion in workers representation. Finally the court directs the parties to uphold the union constitution and the law in the management of finances and other resources between the union and Mombasa branch and promote consultation for the benefits of all the members.

DISPOSITION

17. For the reasons stated above, Judgment is entered for the claimants declaring the dissolution of Mombasa branch of the union unfair, and unlawful for having been done in breach of the union constitution and principles of natural justice and it is therefore reinstated. On the other hand the newly created Mazeras branch, Changamwe branch and Mvita branch of the union are suspended until 2016 when the term of office for the elected officials of Mombasa branch of the union lapses. The respondents are condemned to pay costs of the suit to be agreed or taxed. This decision is to be served on the Registrar of Trade Unions forthwith to suspend the said new branches with the same speed she used to register them

Dated signed and delivered this 15th day of May 2015.

O. N Makau

Judge