



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NUMBER 1874 OF 2014

ZACHARY BINYANYA.....1ST CLAIMANT

JOSEPHAT SHIKUTWA.....2ND CLAIMANT

PATRICK MWANGI.....3RD CLAIMANT

JULIA W. GICHOBI.....4TH CLAIMANT

CHARLES KIRURI WAHOME.....5TH CLAIMANT

SHEIKH ABDI MOHAMED.....6TH CLAIMANT

HALIMA MOHAMED.....7TH CLAIMANT

VERSUS

UNION OF KENYA CIVIL SERVANTS.....RESPONDENT

RULING

1. The application dated 23rd October, 2014 was brought under certificate of urgency on the ground that the respondent threatened to terminate the claimant's services as its national representative due to no fault of their own. Consequently the applicants sought interlocutory mandatory injunction to reinstated them to the National Executive Board of the respondent pending the hearing and determination of the suit. The applicants further sought that the respondents' be restrained by injunction from interfering with claimant's contract of employment including monthly allowances, conducting of regional or branch assignments and activities.

2. The applicants' aver that their removal from office was unprocedural and unlawful and that it was tinged with internal mismanagement and misinterpretation of sections of the respondent's constitution. They further complained that prior to their removal they were neither heard nor served with adequate notice of intention to terminate their services.

3. The application was supported by the affidavit of Zachary Binyanya sworn on 22nd October, 2014 stating in the main as follows.

(a) That the union of Kenya Civil Servants conducted elections on 12th September 2011 countrywide through a letter drafted by the union secretary Mr. Tom Odege.

(b) That they were elected as NEB members for a period of 5 years which was meant to end at the end of the year 2016.

- (c) That they have since then diligently served the union in their capacity as NEB members for a period of two and a half years.
- (d) That their duties included and not limited to:-
- (i) Recruiting union members,
 - (ii) Running daily affairs of the union,
 - (iii) Linking the branches to the national office,
 - (iv) Addressing views and complaints of the members,
 - (v) Educating members and
 - (vi) Holding the national office accountable to the budgetary allocations.
- (e) That according to the union of Kenya Civil Servants constitution, they served under the National Quinquennial Delegates Conference and were elected by the same body to serve for a period of five years as indicated under Article 15 of the said Constitution.
- (f) That they received a letter from the Secretary General dated 15th of October, 2014 unilaterally and arbitrarily without any justifiable cause, unlawfully and maliciously terminating some of them from serving as National Executive Board Members.
- (g) That the said Secretary General did not have any powers to terminate them at all or whatsoever until the decision was made by the Quinquennial Delegates Conference which was the supreme organ.
- (h) That they learnt that the Central Governing Council which was one of the organs that served the union sat on the 10th of October, 2014 and resolved that they needed to be terminated.
- (i) That they were advised by their advocates on record which advice they verily believed to be true that for such a decision to be made to terminate their services, they have the right to be heard and that notice must be served upon them before any action was taken otherwise the act was a gross violation of their fundamental rights. The only organ to terminate their services being the Quinquennial Delegates Conference.
- (j) That they were advised by their advocates on record that Article 12 of the Union of Kenya Civil Servants constitution was very clear that no official shall be suspended or expelled unless he/she has been given an opportunity to state his/her case personally or in unity and the same should be within 14 days.
- (k) That they noted that the said body selectively read and misinterpreted the provisions of the said constitution which they applied with double standards hence the gesture was an abuse of office.
- (l) That as evident on their face, the letters of termination aforesaid did not state the reasons for the adverse decisions therein. This was despite the fact that the decision challenged impacted negatively on their reputation, status, careers and livelihood.
- (m) That it was evident that the union acknowledged that the constitution of the UKCS had serious anomalies that needed to be reviewed as expressed in paragraph 4 of the annexure ZB-001 which the Secretary General called for urgent review, yet the same constitution was the one they were purportedly using to terminate their services.

(n) That the purported removal from being NEB members was contrary to the Union's Constitution since the supreme organ which had the powers to do so was the Quinquennial Delegates Conference.

(p) That the claimants petitioned the Respondent to accord reason for the decision therein and to withdraw the letters the subject matter thereof without success leaving them with no choice but to seek Court intervention against this act of impunity and to enforce their constitutional right being violated by the Respondent.

4. The respondent in response to the averments in Mr. Binyanya's affidavit deposed through Mr. Noah Rotich as follows:-

(a) The unions organs were established and defined in the Union's constitution in order of supremacy and precedence under Article 14 of the said Constitution.

(b) One of the organs of the Union was the National Executive Board. Membership to the National Executive Board was composed of the Seventeen National Officials and Regional representatives.

(c) The decision to terminate the services of the claimants was made by the Central Governing Council which was the Governing Council of the Union.

(d) Under Article 15 of the Union's Constitution, the Central Governing Council was composed of forty seven County/branch representatives, seventeen National Officials. From this pool of the National Officials and Forty Seven County/branch officials, the Central Governing Council was to elect sixteen regional representatives to the National Executive Board.

(e) In electing the sixteen regional representatives the National governing Council was guided along the lines of the eight former provinces of the Republic of Kenya with each former province or region contributing two representatives.

(f) The constitution of the Union envisaged two sets of branches: the forty seven county branches and the seventy four District branches. All these sets of branches, whether county or Districts were registered with the Registrar of trade unions.

(g) It was the use of the word "branch" in these two contexts that had caused the confusion leading to these proceedings.

(h) The claimants were branch officials at the District level. That is to say, they represent the branch in the context of the former Districts of the Republic of Kenya and not in the context of the County branch. It was the County branch officials who could sit in the National Executive Board.

(i) Article 14 of the Union's Constitution gives the Central Governing Council the power to interpret the Union's Constitution at Article 15 paragraph 4 (g).

(j) Accordingly, the correct interpretation by the Central Governing Council was that the composition of the National Executive Board could only draw its membership from the country branch officials envisaged under Article 15 and not Article 18 of the Constitution.

(k) In their misapprehension of the Union's constitution, the claimants upon being elected wrongly attended the meetings of the National Executive Board and arrogated themselves the role of the National Executive Board.

(l) It was this anomaly that the Central Governing council which was mandated to

interpret the union's Constitution sought to correct when they sat on 10th October, 2014 and decided to communicate to the claimants that they had been replaced.

5. Ms. Arati for the applicants submitted before me that the respondent violated its own constitution by unlawfully dismissing the applicants. Counsel further submitted that the replying affidavit of Mr. Rotich ought to be struck out as he was the chair of the respondents and did not have authority to swear an affidavit. According to counsel, only the Secretary General was the one mandated to swear an affidavit on behalf of the respondent. It was her argument that under article 8 of the respondent's constitution, the Secretary General was the one with administrative authority and not the Chairman. He was the one who signed the dismissal letters and not the chairman. According to Counsel therefore, Mr. Rotich could not answer to the issues deponed to in his affidavit hence the same ought to be struck out.

6. Ms. Arati further submitted that under article 7 (2) of the respondent's constitution, the claimants were National Executive Board (NEB) members elected for a term of 5 years via a letter dated 10th June, 2011 exhibited as annex 001, the Secretary General called an Annual Delegates Conference. This letter according to counsel acknowledged ambiguity in the respondents constitution but the elections still proceeded nonetheless and the applicants were elected. According to counsel, the letter in question recommended the appointment of task force to harmonize the constitution with the current circumstances. She submitted that the elections took place under article 15 of the respondent's constitution and the applicants were thus elected by the National Quinquennial Delegates Conference (NQDC), the supreme organ of the union whose decision was final. The claimant's removal therefore should have been dealt with by NQDC.

7. Counsel further submitted that the letter of 15th October 2014, was unprocedural and illegal since it violated rules of natural justice. The claimants were neither given notice of intention to dismiss them nor opportunity to reply to the allegations against them. According to counsel, under article 12 (3) of the respondents constitution no official could be expelled or suspended before a hearing by the National Executives Board and that the person to be expelled or suspended must be given notice of the charges.

8. Counsel further submitted that the County Executives were not full time employees of the respondent contrary to article 18 of the respondent's constitution. Therefore if the constitution was to be strictly followed all the office bearers ought to have been removed for being unprocedurally in office.

9. Mr. Onyango for the respondents on the other hand submitted that nowhere in the respondents' constitution was it written that only the Secretary General can sign an affidavit on behalf of the respondent. Counsel further submitted that the letter dismissing the applicants was not unprocedural since it was issued pursuant to a resolution by the Central Governing Council. According to Counsel, membership to the Central Governing Council consist of 17 National officials and trustees. The applicants were neither of these. He further submitted that article 7 described national officials who are either County Branch Officials or Secretaries yet the applicants have neither said if they are County Branch Officials nor County Secretaries.

10. According to counsel, NEB comprises of Central Governing Council and County Secretaries who constitute an electoral college and elect 16 others to form NEB. Counsel therefore submitted that if the claimants are not in the Central Governing Council then they cannot be members of the NEB. According to counsel therefore, the decision to remove the claimants was the right thing to do since they were elected under article 18 (1) (b) of the respondent's constitution yet the constitution did not contemplate Branch Officials sitting in the Central Governing Council.

11. This is an application for interlocutory relieve hence the Court should be circumspect in delving deeper into issues. These should be left to the main trial. I have endeavoured to summarize the factual as well as legal arguments that inform the present application and I am of the view that the applicants have made out a prima facie case with a high probability of success.

The issue I must therefore consider is whether it is a proper case for grant of interlocutory mandatory injunction.

12. It must be borne in mind that an interlocutory mandatory injunction compels a party to undo an act already done pending the hearing and determination of the main claim. It in essence amounts to an interlocutory final judgment and in most cases once granted, the party in whose favour it is made may not have the urge to pursue the dispute further. It is therefore an order that ought to be granted at the interlocutory stage only in exceptional circumstances.

13. Therefore, is this such a case? The parties in this suit have canvassed their respective factual and legal positions as summarized earlier in this ruling. It would seem that the common ground is that there are interpretational as well as operational hiccups of the respondent's constitution in the context of the present system of government circumstantiated by the new National Constitution. According to the respondent, the election of the applicants was contrary to the respondent's constitution hence their removal was inevitable in order to correct the anomaly. The applicants on the other hand maintain that their election to office proceeded despite the anomaly hence they were procedurally in office and their removal could only be done following the respondent's constitution and upon being accorded a fair hearing in accordance with rules of natural justice which they claim did not happen in their case.

14. Courts are traditionally reluctant to interfere in the operations and decisions made by private social clubs, societies and unions but will do so where their decisions or operations are in breach of their own internal rules or constitution or rules of natural justice generally. Both the applicants and the respondents have acknowledged that there were problems in aligning the respondent's constitution to the present system of administration. It would therefore not be right for the respondent to remove the applicants from office in such scenario. The matter ought to have been handled in a consultative manner and in accordance with the decision-making structures of the respondent prior to dismissing the applicants. To this extent, the Court is reasonably persuaded that this is a proper case for granting interlocutory mandatory injunction which I hereby do as prayed in prayer 2 of the motion.

15. It is so ordered.

Dated at Nairobi this 7th day of May 2015

Abuodha J. N.

Judge

Delivered this 7th day of May 2015

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge