



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
JUDICIAL REVIEW 3 OF 2014
(Formerly Nairobi H. C. JR 68 of 2009)
REPUBLICAPPLICANT

Versus

MRS B.W. GACHEGU1st RESPONDENT
J. M. IKIARA.....2nd RESPONDENT
WILLIAM K. LANGAT.....3rd RESPONDENT

And

KENYA UNION OF COMMERCIAL FOOD
AND ALLIED WORKERS UNION.....1st INTERESTED PARTY
AGAPIO MURIUKI ANTONY.....2nd INTERESTED PARTY
BENSON IRUNGU MAINA.....3rdINTERESTED PARTY
CENTRAL ORGANIZATION OF
TRADE UNION (KENYA).....4th INTERESTED PARTY

EXPARTE

MAINA MBUI.....1st APPLICANT
DANIEL NDUMBU KYULE.....2nd APPLICANT
STEPHEN KANYARI.....3rd APPLICANT

Mr Kibe Mungai for Applicant

JUDGMENT

1. This Application was brought pursuant to the leave granted on 30th January, 2009 by Honourable Justice Nyamu. The effect of the leave granted on 30th January, 2009 by Hon Nyamu J was to stay the decision and actions of the 1st, 2nd and 3rd Respondents being The Registrar of Trade Unions, The Assistant Registrar of Trade Unions and Senior Assistant Registrar of Trade Unions respectively to effect changes of officers of Kenya Union of Commercial Food and Allied Workers Union, the 1st Interested party as directed vide letters and affidavits dated 30th July, 2008, 31st July 2008 and 16th September, 2008.
2. The effect of these changes was to remove the name of Agapio Muriuki Antony, 2nd Interested party and Benson Irungu Maina 3rd Interested party from the Register of National Officials of the Union (1st Interested Party), effectively removing the two from office to the loss of their privileges and remuneration set out in this matter.
3. **Issues for Determination**
 - i. Whether 1st, 2nd and 3rd Respondents were validly in office when they removed the 2nd and 3rd interested parties from the Union offices.
 - ii. If the 1st, 2nd and 3rd Respondents were not validly in office, what was the effect of their action.
 - iii. What remedies if any are available to the Applicants in this matter.

4. Issues (i) and (ii)

The office of the Registrar of Trade Unions is a statutory position. The Labour Relations Act under **Section 84** served to repeal the Trade Disputes Act under which the 1st, 2nd and 3rd Respondents had been appointed but failed to deal with the transition of the Respondents.

5. The Labour Relations Act 2007 did not specifically provide that the 1st, 2nd and 3rd Respondents were appointed under the repealed Trade Disputes Act under **Section 5** and **6** would continue to carry out duties as if they had been appointed under the new labour laws. Instead the Labour Institutions act provided for the appointment of a Registrar of Trade Unions, the Deputies and Assistants under Section 63 and in accordance with the new Act.
6. At all material times, the Minister In-charge of Labour did not appoint the Registrar of Trade Unions, the Deputy and Assistants until the 12th March, 2009 when the Minister appointed the 3rd Respondent as the Acting Registrar of Trade Unions under Gazette Notice No 2645 dated 13th March, 2009. The 3rd Respondent was subsequently confirmed to the position on 20th October, 2009 under Gazette Notice No 12355.
7. It is clear that the positions of the 1st, 2nd and 3rd Respondents remained vacant and the action by the 1st, 2nd and 3rd Respondents to remove the 2nd and 3rd Interested Parties from the official register was illegal. The three therefore acted without jurisdiction and their actions are null and void.
8. The Court was referred to the matter of **Republic vs Chief magistrate Milimani Commercial Court and 2 Others Ex-parte Violet Ndanu Mutinda and 5 Others [2014] eKLR** where the High Court stated the grounds on which it exercises its powers of Judicial Review and quoted the decision in **Council of Civil Unions Vs Minister for the Civil Service (1985) Ac 2** where it was held inter alia that;

“illegality is when the decision making authority commits an error of Law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provisions of a law or its principle, are instances of illegality”

9. It is the Courts considered view therefore that the 1st, 2nd and 3rd Respondents had no jurisdiction

to change the register when they did so. It did not matter that the Union had conducted an election where the affected persons had been removed from the office. The Respondent should have waited to be properly appointed before exercising the authority they purported to have.

10. The Court in this application cannot go to the merit of the effected change. The fact that a Union Delegates Conference was held on 21st June, 2008 in which the 2nd and 3rd Interested Parties had been removed from office is immaterial in determining whether or not the 1st, 2nd and 3rd Respondents acted lawfully. **In Municipal Council of Mombasa Vs Republic and Umoja Consultants Ltd, Civil Appeal No 185 of 2001, it was held:**

“Judicial review is concerned with the decision making process not with the merits of the decision itself. The Court would concern itself with such issues as to whether the decision makers had jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision, the decision maker took into account relevant matters or did take into account irrelevant matters The Court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself such as whether there was or there was not sufficient evidence to support the decision”

Issue iii

11. What relief is available to the Exparte applicants?

The applicants seek;

- a. An order of *Certiorari* to remove into this Court and quash the decision of the Respondents made and manifested through letters and affidavits dated the 30th July 2008, 31st July 2008 and 16th September 2008 registering change of officials of the 1st Interested Party.
- b. That an order of prohibition do issue prohibiting the Respondents from acting or holding themselves out as the Registrar of Trade Unions, Assistant Registrar of Trade Unions and Senior Assistant Registrar of Trade Union unless and until appropriately appointed by the Minister in Charge of Labour in accordance with the provisions of the Labour Institute Act (No. 12 of 2007).
- c. Costs of the Application.

Admission

12. It is admitted by the 2nd and 3rd interested parties in their submissions filed on 29th May, 2014 that the Minister in Charge of Labour appointed the 3rd Respondent on 12th March, 2009 as the Acting Registrar of Trade Unions under Gazette Notice No. 2645 dated 13th March, 2009 and was confirmed on 20th October, 2009 vide gazette notice No. 12355. Clearly the issue of validity of appointments of the 1st, 2nd and 3rd Respondents has since been overtaken by events and prayer (b) above is no longer available to the Applicants.

13. However, prayers (a) set out above is still valid and The Court makes:

- a. An order of *Certiorari* to remove into this court and quash the decision of the 1st, 2nd and 3rd Respondents made and manifested through letters and affidavits dated 30th July 2008, 31st July 2008 and 16th September 2008 registering change of officials of the 1st interested party.
- b. That the costs of this application be paid by the Respondents.

14. The Court is aware of the submissions by the 1st interested party that this application has been overtaken by events and therefore orders sought are; *‘a fait accompli’* this is because the 1st interested party has conducted several fresh elections and new officials have been elected and notice of change of officers have severally been registered.

15. This maybe the case but it does not mean that the 2nd and 3rd interested parties are without remedy. They should on the basis of the finding of the Court, file appropriate civil suit for damages in respect of injury visited on them courtesy of the unlawful conduct by the 1st, 2nd and

3rd Respondents.

16. The Court's hands are tied and cannot deal with that aspect of the case in this Application.

Dated and Delivered at Nairobi this 26th day of June, 2015.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE