



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NUMBER 551 OF 2015

BETWEEN

GEOFFREY MAREKO..... CLAIMANT

VERSUS

1. THE NATIONAL GENERAL SECRETARY DOCK WORKERS UNION

2. DOCK WORKERS UNION

3. KENYA PORTS AUTHORITY.....RESPONDENTS

RULING

1. The Claimant filed his Statement of Claim on 5th August 2015. He prays the Court to grant him an Order, freezing the 2nd Respondent's Barclays Bank Account Number 1093734. He also seeks, to have frozen, an Account at Mombasa Port Sacco Savings and Credit Account of Dock Workers Union. Details of this second Account are not given. The Second prayer in the Claim is that the Accounts remain frozen until new Officials are elected in a Special Conference, which the Claimant has scheduled for 15th August 2015. Thirdly, the Claimant prays that the 3rd Respondent is ordered to withhold deductions in trade union dues, from Members of the 2nd Respondent, pending the outcome of the conference and/ or determination of the Claim. These substantive prayers are likewise sought as provisional measures, through an Application filed simultaneously on the same date as the Claim. That Application was presented and heard yesterday under certificate of urgency, and is the subject of today's Ruling.

2. The Application is made under Rule 16 of the Industrial Court [Procedure] Rules 2010 and Article 159 [2] [d] of the Constitution of Kenya. The grounds upon which the Application is based are stated on the face of the Notice of Motion and in the Verifying Affidavit sworn by Mr. Mareko on the 5th August 2015.

3. Hearing took place yesterday in the presence of all the Parties' Representatives.

4. **The Claimant** submits the Special Conference is scheduled for 15th August 2015 and unless the funds of the 2nd Respondent are protected, the Leadership which has lost legitimacy, by virtue of being dismissed from employment, can empty the accounts to the detriment of the 2nd Respondent Trade Union.

5. The Claimant explains he is an Employee of the 3rd Respondent, and a Member of the 2nd Respondent by virtue of being an Employee of the Port. The 1st Respondent is the National General Secretary of the

2nd Respondent, and the 3rd Respondent the Employer of the 2nd Respondent's Members.

6. It is submitted the 3rd Respondent dismissed from employment, all the Officers of the 2nd Respondent. The 1st Respondent has no Officials or Secretariat to assist him in discharging his role. He and the dismissed Officials have no access to the 3rd Respondent's premises and cannot transact any business on behalf of Union Members.

7. The 1st Respondent continues to withdraw money from the Union Bank Account. He is applying the money to his own use. He has no Executive Committee to sanction expenditure. Members have called a Special Conference to elect new Officials. The 2nd Respondent does not have legitimate Secretariat and Officials.

8. The 1st Respondent is not an Employee of the 3rd Respondent. 28 Officials were sacked, but only 20 have challenged their sacking in Court. There is therefore need to have an election, and pending that election, have the union funds preserved.

9. Rules 8 and 15[1] of the Trade Union Constitution allow Members to call for Special Conference to elect new Officials to replace the sacked ones. The Members have duly complied and called a Conference on 15th August 2015 to elect new Officials. It is important the union funds are preserved pending the election of new Officials. The Claimant has not acted in breach of the Labour Relations Act. He is mandated by the Trade Union Constitution to call the Special Conference.

10. The **1st and 2nd Respondents** submit the application is misconceived. The Claimant seeks to freeze the Trade Union Accounts on the basis that there is a scheduled election. His pay slip, attached to the Statement of Claim, shows the Claimant is not a Member of the Dock Workers Union.

11. The notice calling for the Special Conference, whose agenda is the election of new Officials, is issued by the Claimant Mr. Geoffrey Mareko. Section 41 of the Labour Relations Act authorizes the Industrial Court to issue an injunction restraining unauthorized or unlawful expenditure of a Trade Union's Funds, on the application of the Registrar of Trade Unions or by 5 or more persons having interest in the reliefs sought.

12. The convening of a Special Conference is done through the General Secretary, under the 2nd Respondent's constitution. Mr. Mareko is not the General Secretary. He can neither call a Special Conference, nor seek to freeze the 2nd Respondents Accounts. It is not clear whether the Claimant seeks to have the 20 Employees allegedly sacked replaced as Trade Union Officials. It is not stated why the remaining 8 should similarly be subjected to premature election.

13. Lastly the 1st and 2nd Respondents submit there is pending in Court, Award in Cause 532 of 2014. This Claim was brought by Mr. Mareko and others against the 1st and 2nd Respondents. He prays in the Claim to have among other orders, a notice dated 16th September 2014 which called for an Annual Conference on 18th October 2014 declared null and void, and proceedings and resolutions made at the Annual Conference be similarly invalidated. He prays the Court to endorse the old constitution of the 2nd Respondent which predated the Annual Conference of 18th October 2014. The new Constitution shifted the 2nd Respondent's affiliation from COTU [K] to the Trade Union Congress [TUC]. These prayers are due to be determined by the Court on the 2nd October 2015.

14. The **3rd Respondent** submits it did not have sufficient opportunity to file its Response. However Counsel for the 3rd Respondent argues the Application on the face of it appears defective. It is not based on a Supporting Affidavit. It is based on the Verifying Affidavit. It has no legs to stand on. There is no Affidavit showing ownership of the Accounts sought to be frozen. The Court cannot assume the existence of the Accounts. Freezing of Bank Accounts is drastic and would destabilize the operations of the 2nd

Respondent. It would inhibit the 2nd Respondent in defending and prosecuting Court Claims on behalf of its Members. The prayer for withholding of Trade Union dues is improper. The Claimant is not the proper Party to seek such orders. The 3rd Respondent deducts Trade Union dues on the instructions of the Trade Union and Individual Members.

The Court Finds:

15. **Firstly**, Section 41 of the Labour Relations Act empowers the Industrial Court to grant injunctive reliefs, restraining the unauthorized or unlawful expenditure of the funds of a Trade Union or an Employers' Organization. This law requires an Application for such orders is made by the **Registrar of Trade Unions**, or by **5 or more persons, having sufficient interest in the relief sought**.

16. The Claimant seeks an injunctive relief freezing the Bank and Sacco Accounts of the 2nd Respondent. This prayer falls under Section 41. He has come to Court alone. He is not accompanied by at least 4 other Persons. The Claim is not made by the Registrar of Trade Unions. On this ground alone, the Claim and the Application, seeking similar prayers as they do, are both misconceived.

17. The other requirement is that even when the injunctive reliefs are sought by 5 or more Persons, such Persons must demonstrate they have sufficient interest in the relief sought.

18. The Claimant's interest is that he is a Member of the 2nd Respondent, by virtue of being an Employee of the Kenya Ports Authority. Section 41 above does not require Applicants for injunctive relief, such as is sought, to be Members of the Trade Union. The requirement is that they show sufficient interest. Where sufficient interest is reduced to membership of the Trade Union, then the Applicants must demonstrate they are indeed Members of the Trade Union.

19. Unfortunately the Claimant has not shown evidence of his Membership to the 2nd Respondent Union. He states in his Statement of Claim paragraph 2, that he is an Employee of the Kenya Ports Authority, check number 88922, and a Member of the Dock Workers Union by virtue of being an Employee at the Port.

20. This cannot be evidence of membership to a Trade Union. Membership to trade union is not determined by the fact of employment in a collective bargaining unit represented by a particular Trade Union. The Employee must show he is a Member of the Trade Union through a membership card, membership number or through evidence of payment of subscription fees. The Claimant's pay slip attached to his Statement of Claim, does not show he is deducted trade union dues, which are remitted to the 2nd Respondent, as his regular membership fee. He has not shown the Court he could have paid trade union dues directly. The pay slip marked GMM-1, shows the only trade union dues deducted from the Claimant's salary in the month of July 2015, is on account of COTU subscription. The Claimant has not even shown there could be some form of agency fees deducted on his account and paid to the 2nd Respondent under Section 49 of the Labour Relations Act. There is no money deducted from his salary under Section 48 of the same Act. The Court cannot accept the position that Employees at the Port of Mombasa become Members of the Dock Workers' Union, by virtue of employment. The Claimant's position suggests the presence of Union Shop or Closed Shop Agreements at the workplace. The Court ruled in ***Tailors & Textiles Workers Union v. Ashton Apparels [EPZ] [2015] e-KLR*** that such agreements offend the Labour Relations Act as well as the Constitution of Kenya. Membership to a trade union cannot be automatic. The Claimant needed to show how he is a Member of the 2nd Respondent, beyond stating he is a Member by virtue of employment at the Port. His pay slip certainly does not show any nexus between him and the 2nd Respondent.

21. **Secondly**, the Claimant grounds his Application on the notice he issued calling for the Special Conference to elect new Officials on the 31st July 2015. This notice is based on Rules 8 and 15 [1] of the Union Constitution.

22. The Constitution attached to the Claim was registered on 23rd December 2008. In the course of hearing Cause Number 532 of 2014, there emerged evidence of a new Constitution of the Dock Workers Union, which was recently registered and which endorsed the end of the marriage between COTU and the Dock Workers Union, paving way for the new union between TUC and the Dock Workers Union.

23. The validity of both constitutions is the subject of the decision of this Court, scheduled for delivery on 2nd October 2015. It is unfortunate that Mr. Mareko has selected to go by the old Constitution calling for Special Conference, while he has initiated a Claim in which he seeks the Court's determination on which constitution is valid.

24. It seems to this Court the notice issued for the Special Conference cannot be valid, there being 2 Constitutions within this Trade Union, which are subject to the contestation of the Parties, and which the Court is going to make a determination on, in October 2015.

25. Even assuming there is no dispute on which Constitution to adopt, it is not clear if the Claimant has met the requirements of Rule 8 and 15 of the Constitution of 2008 which he prefers. Rule 8A allows the National General Secretary to convene a Special Conference pursuant to a resolution of the National Executive Committee.

26. Members may under Rule 8D convene a Special Conference, if for any reason the National Secretary General, upon requisition by Members, fails to convene a Special Conference. The Members in such a case have the right to nominate one of them, to convene the Conference.

27. In this case the Claimant has not only failed to show he is a Member of the 2nd Respondent Union; he has not shown Members have met, and nominated him to convene the Special Conference. He has not shown evidence of any requests made by the Members, to the General Secretary, to call a Special Conference, and shown the refusal by the General Secretary to do so. Bullet 4 of the Notice of Special Conference simply states: *"I wish to urgently call a special conference at Bandari College..."* It is signed in the name of the Claimant. He does not describe himself as a Member of the Union in signing the Notice. A Member cannot just wish to call a Special Conference and proceed to do so, without fulfilling the prerequisites for such a decision under Rule 8. It is not suggested there were any attempts at having the General Secretary call the conference; that he refused to do so; and that there were held any Members' meetings where the Claimant was nominated to call the Conference. What will happen if every Employee at the Port, leave alone Members of the Union, wish to call Special Conferences, and called such Conferences, each purposed on holding elections?

28. **Thirdly**, the proposed meeting is aimed at conducting an election on the basis that 28 Officials of the 2nd Respondent have been dismissed. There is no extract from the Registrar of Trade Unions showing which Trade Union Officials have been dismissed so as to necessitate an election. The Court is aware the alleged dismissals have been challenged in Court not only by the 20 Employees in Cause Number 448 of 2015, but also by other Members of the 2nd Respondent in Cause Number 451 of 2015. The Court stayed proceedings in the latter Claim, pending decision in the former. Until the Court has ruled on the Employees' prayer for reinstatement, it is foolhardy to rush into concluding their dismissal from employment is done and dusted, justifying electoral activities. Rule 8 of the old Constitution calling on filling of vacancies cannot be invoked until the dismissal decision has been consummated through judicial endorsement.

29. **Fourthly and lastly**, the Court agrees with the 3rd Respondent/Employer that its Employee, the Claimant herein, has no mandate to demand the 3rd Respondent is ordered to with-hold Members' subscription fees. Trade Union dues are deducted on the authority of the Individual Members, made expressly or through the Trade Union. A third Party cannot interfere with individual Employees' choice in salary disposal. No Members have sworn affidavits asking their subscription fees be with-held. If they do not wish to continue paying trade union dues, there are avenues for that under the Labour Relations Act. It cannot be for a 3rd Party to demand suspension of payment of trade union dues. The Court has not been told in what way the incumbent Officials are engaged in unauthorized and unlawful expenditure of

Trade Union funds. The Claimant merely apprehends there is going to be such expenditure without availing to the Court reasonable basis for the apprehension.

30. The Court is satisfied the Claim and the Application have no merit and are totally misplaced.

IT IS ORDERED:-

[a] The Application and the Claim are rejected in their totality, with no order on the costs.

Dated and delivered at Mombasa this 12th day of August 2015

James Rika

Judge