



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1987 OF 2015

LAWRENCE NYAGUTI OCHIENG.....1ST CLAIMANT
 VERONICA WAIRIMU WACIURI.....2ND CLAIMANT
 HARRISON MURAYA KARIUKI.....3RD CLAIMANT
 SAMMY KOOME MUTIGA.....4TH CLAIMANT
 PAUL KARIUKI NDUNGU.....5TH CLAIMANT
 BERNEDETTE KOKI KAVILA.....6TH CLAIMANT
 JORN MOBEGY NYACHIRO.....7TH CLAIMANT
 ERIC OCHIENG ABONGO.....8TH CLAIMANT

VS

UNION OF KENYA CIVIL SERVANTS.....1ST RESPONDENT
 TOM ODEGE.....2ND RESPONDENT
 JUSTUS K MUGO.....3RD RESPONDENT
 KENYA REVENUE AUTHORITY.....INTERESTED PARTY

RULING

Introduction

1. On 6th November 2015, the Claimants filed a Statement of Claim together with a Notice of Motion under certificate of urgency seeking orders to stop a meeting of a Special National Delegates Conference (SNDC) of the 1st Respondent scheduled for 12th September 2012, suspension of the 2nd and 3rd Respondents from office as well as freezing of the 1st Respondent's bank accounts.

The Notice of Motion

2. The Notice of Motion which is supported by the affidavit of the 1st Claimant, Lawrence Nyaguti Ochieng is based on the following grounds:

- a. The 2nd Respondent has irregularly convened a Special National Delegates Conference of the 1st

Respondent to be held on 12th November 2015;

- b. As a result of the irregular SNDC, the Union would expend funds, or be committed to, or indebted on expenditure contrary to the Union Constitution and Financial Manual as well as the Labour Relations Act;
- c. If the SNDC scheduled for 12th November 2015 is allowed to proceed, the Union will inevitably incur unauthorised, irregular and unlawful expenditure from the resources of the Union. This would render a just determination of the claim nugatory;
- d. Incurring irregular, unauthorised and unlawful expenditure shall greatly prejudice the affairs of the Union and the interests of its members;
- e. The 2nd and 3rd Respondents are engaged in a concerted effort of wasting the resources of the Union. If this is not stopped at the earliest possible time, the Union will continue losing its resources and eventually be run down;
- f. The National Executive Board (NEB) has failed to discharge its constitutional mandate which would have salvaged and protected the resources of the Union. The 2nd Respondent has refused to itemise in the agenda of the NEB, the question of his conduct and that of the 3rd Respondent;
- g. The 2nd and 3rd Respondents are signatories to all Union bank accounts from which they continue to withdraw unauthorised monies;
- h. So far the Union has lost Kshs. 13,000,000 in the financial year 2014 out of the actions of the 2nd and 3rd Respondents;
- i. Further, the Union is indebted to the Kenya Revenue Authority (KRA) to the tune of Kshs. 90,134,760 in deducted and unremitted pay as you earn (PAYE) taxes;
- j. If the 2nd and 3rd Respondents are not suspended from their respective offices, the Union risks losing funds constituting Union members' subscriptions which are receivable on 10th November 2015 or thereabouts;
- k. If the SNDC scheduled for 12th November 2015 is allowed to proceed, the object of the application and the underlying claim shall be rendered nugatory;
 - If the Court does not intervene and stop further withdrawals of monies from the Union's bank accounts, the object of the claim shall be rendered nugatory;
- m. If the 2nd and 3rd Respondents are allowed to continue being in office they are likely to continue wasting the resources of the Union and run down the Union.

3. In the supporting affidavit sworn by Lawrence Nyaguti Ochieng, it is deposed that the SNDC was called by a National Executive Board whose proceedings were irregular as the meeting was chaired by a person not entitled to chair it. Ochieng states that the National Chairman, Noah K. Rotich, was irregularly and unjustifiably obstructed from chairing this meeting.

4. Ochieng further deposes that he has been informed by the National Chairman that upon learning of the non-remittance of PAYE to KRA, he sought an explanation from the 2nd Respondent which was not forthcoming. The National Chairman is said to have written to KRA on 27th July 2015 inquiring on the tax compliance status of the Union in response to which KRA provided a demand note dated 16th March 2015 which had been sent to the Union. According to the demand note, the Union owed PAYE taxes amounting to Kshs.90,134,760.00.

5. By a letter dated 1st October 2015, the National Chairman wrote to the 2nd Respondent requiring

him to convene a meeting of the NEB with a view to discussing the conduct of the 2nd and 3rd Respondents who are charged with the responsibility of deducting and remitting PAYE.

6. On 8th October 2015, a National Trustee of the Union, Kennedy A. Were wrote to the 2nd Respondent raising a complaint on the non-remittance of PAYE taxes. Were accused the 2nd Respondent of concealing the KRA demand note from the governing organs of the Union. He asked the 2nd Respondent to convene a meeting of the NEB to discuss the 2nd Respondent's conduct.

7. Ochieng further depones that the PAYE deductions un-remitted to KRA are not reflected in the Union financial statements either as a liability or part of reserves. He alleges that the 2nd and 3rd Respondents have converted the funds deducted as PAYE to their personal use contrary to Article 26 of the Union Constitution.

8. Ochieng states that the 2nd Respondent did not convene the meeting as asked by both the National Chairman and National Trustee nor did he include his conduct as an agenda item in the meeting of the NEB held on 12th November 2015.

The Respondents' Reply

9. In a replying affidavit sworn by the 3rd Respondent, Justus Mugo it is deponed that the Constitution of the 1st Respondent has a clear procedure for disciplining of national officials which the Claimants had not exhausted before coming to Court. In particular, Article 12 of the Union Constitution avails mechanisms for addressing the disciplinary and ethical issues alleged against the 2nd and 3rd Respondents.

10. With regard to the SNDC meeting in question, Mugo depones that the said meeting was called by the NEB through a resolution passed on 16th October 2015.

11. The National Chairman, Noah Rotich attended the NEB meeting but did not chair it due to protests from members. Mugo denies that it was the 2nd Respondent and himself who prevented the National Chairman from chairing the NEB meeting.

12. Rather, it was the members of the NEB who felt that the National Chairman was not impartial and was incapable of fairly executing his mandate as envisaged under Article 8(1) of the Union Constitution.

13. The National Chairman, having been stopped from chairing the meeting relinquished the chair to his deputy who is constitutionally mandated to deputise the Chairman. The resolutions passed at the meeting of the NEB on 16th October 2015 were therefore valid. Following the NEB meeting, the SNDC was convened with the main agenda being discussion on amendments to the Union Constitution as directed by the Registrar of Trade Unions.

14. With regard to the allegations of financial impropriety made against the 2nd and 3rd Respondents, Mugo states that these are serious allegations bordering on criminal conduct being leveled without any evidence.

15. Mugo counteracts the Claimants' averment that the NEB has failed in its mandate to salvage and protect the resources of the Union and reiterates that the Union Constitution avails mechanisms for addressing internal disputes which mechanisms have not been exhausted.

16. While admitting that he and the 2nd Respondent are signatories to all Union bank accounts, Mugo denies that the alleged losses are as a result of their actions. He adds that the Union had not suffered any losses since assuming office by the 2nd and 3rd Respondents.

17. With respect to the issue of un-remitted PAYE taxes, Mugo states that the National Chairman was

well aware of all discussions on the matter and efforts being made to settle the outstanding taxes. He avers that the issue of un-remitted taxes is a historical one that the 2nd and 3rd Respondents are sorting out with KRA. He attributes the non-remittance of taxes to delay in release of union dues by County Governments coupled with deduction in membership.

Determination

18. At the time of writing this ruling, the SNDC had taken place and the application was therefore partly spent. The issue now before the Court is whether the Claimants have made out a case for suspension of the 2nd and 3rd Respondents as well as freezing of the Union bank accounts.

19. The Court was referred to Section 47 of the Labour Relations Act which provides as follows:

47.(1) The Industrial Court may -

(a) order any person who has in his possession or control any property of a trade union, employer's organisation or federation in violation of its rules or who has unlawfully expended or withheld its moneys, to deliver that property or pay that money to its trustees; and

(b) suspend any official who contravenes paragraph (a).

20. This Court is thus empowered by statute to suspend any official who has misappropriated Union funds. The Claimants allege that the 2nd and 3rd Respondents have misappropriated Union funds by committing funds to unauthorised activities. The Claimants submitted that by committing funds for the SNDC which was not properly authorised, the 2nd and 3rd Respondents had misappropriated Union funds.

21. Further, the 2nd and 3rd Respondents had failed to ensure that expenditure was contained within the approved budget thus occasioning an over expenditure to the tune of Kshs.13 Million in the year ended December 2014. The 2nd and 3rd Respondents had also concealed from the Union governing organs, a tax debt owed to the Kenya Revenue Authority assessed at Kshs.9 Million.

22. In granting restraining orders against a trade union and its officials, the Court does not aim at crippling the union but to preserve its assets and integrity for posterity.

23. More importantly, the immense powers granted under Section 47(1)(b) of the Labour Relations Act should be exercised with caution and within the confines of fair play. The Court did not find any *prima facie* evidence to prove the very serious allegations made against the 2nd and 3rd Respondents, to warrant their suspension at the interlocutory stage.

24. The Court was however convinced that there are serious financial management challenges within the Union to warrant its intervention. Consequently, I make the following orders:

- a. Withdrawals from Bank Account Number 01120120993000 in the name of Union of Kenya Civil Servants held at the Cooperative Bank of Kenya are hereby prohibited pending further orders of this Court;
- b. Withdrawals from Bank Account Number 01021003208800 in the name of Union of Kenya Civil Servants held at the National Bank of Kenya are hereby prohibited pending further orders of this Court;
- c. Withdrawals from Bank Account in the name of Union of Kenya Civil Servants held at Elimu Sacco Society Limited are hereby prohibited pending further orders of this Court;
- d. Essential payments may be made from the aforesaid Bank Accounts by an order of any of the

Judges of this Court;

e. The main claim herein shall be heard on priority basis;

f. The costs of this application shall be in the cause.

25. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS
4TH DAY OF DECEMBER 2015**

LINNET NDOLO

JUDGE

Appearance:

Mr. Nyamweya appearing with Mr. Mamboleo for the Claimants

Mr. Ligunya appearing with Miss Onsare for the Respondents