



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1896 OF 2013

NATIONAL UNION OF WATER & SEWAGE EMPLOYEES CLAIMANT

VERSUS

PAUL NJAGI MICHUKI1ST RESPONDENT

ASSA ACHOKI.....2ND RESPONDENT

MARY NDUNGE MUTUKU.....3RD RESPONDENT

RUFUS OLEFA OSOTSI.....4TH RESPONDENT

SOLOMON O. DAVID.....5TH RESPONDENT

PHILEMON OTIENO ATIK.....6TH RESPONDENT

JOEL K. TUWEI.....7TH RESPONDENT

PETER KOIBUHO.....8TH RESPONDENT

ESTHER NYAMBURA DAN.....9TH RESPONDENT

PATRICK KAMAU MUNIU.....10TH RESPONDENT

ZIPPORAH KIENDE MWIRIGI.....11TH RESPONDENT

DENNIS OKWAYO.....11TH RESPONDENT

NATIONAL BANK OF KENYA LIMITED.....12TH RESPONDENT

RULING

M. Njau Mageto Advocate – for the Claimant

Owuor & Co. Advocate – for 1st to 12th Respondents

Sisule Munyi Kilonzo & Associates Advocates – for 13th respondent

1. There are two applications herein that will be considered together for expediency. The claimant's application dated 27th November 2013 and the 6th respondent application dated 29th November 2013.

2. On 27th November 2013, the claimant herein filed a Notice of Motion under section 11 and 20 of the Industrial Court Act, Rule 16, 17, 18, 19 and 27 of the Industrial Court procedure rules and section 42, 43, 44, 45, 46 and 47 of the Labour Relations Act seeking for orders compelling the respondents to handover all books of accounts and any other property of the Union [claimant] in their possession pending the hearing of the application and suit and further that the respondents should be restrained from representing themselves as the registered officials of the claimant and that 13th respondent to file a statement of the claimant account No. 01020060636400 held at National bank, Harambee Avenue, Nairobi. The application was opposed by the respondents, the Replying Affidavit dated 13th January 2014 and sworn by Michael Owour, the respondent advocate save for the 6th respondent who filed his response in person. Both parties made their submissions in court. The 6th respondent who was acting in person appointed his advocate and was able to file his written submissions.

3. The orders sought by the claimant are that:

1. ...

2. *That the honourable court be pleased to issue an order of mandatory injunction compelling the respondents and/or their agents and/or servants and/or their representatives to immediately and/or forthwith handover and/or surrender all the books of accounts and any other property of the union in their possession to the claimant union pending the hearing and determination of this application and our suit;*

3. *That the honourable court be pleased to issue a temporary injunction restraining the respondents and/or their agents and/or servants and/or representatives from purporting to be the registered officials of the claimants union;*

4. *That this honourable court be pleased to order the 13th respondent to file in court the statement of the claimants union account number 01020060636400 held at National bank, Harambee Avenue branch Nairobi within (7) days from the date of this order*

4. The claimant's application is supported by the annexed affidavit of Elijah Otieno Awach and based on the grounds that the claimant union was registered in 2006 and has 8000 members. On 30th April 2013 through a consent order, former officials were removed from office and the Registrar of Trade unions registered new officials on 2nd May 2013. Since then the respondents refused to hand over office. The officials of the claimant applied to change bank signatories in account number 01020060636400 held by the 13th respondent but the other respondents refused to effect changes or allow the officials to operate this account. The Registrar of Trade union allowed the officials to open a different account which is now account Number 01120201219200 with Co-operative Bank of Kenya Limited, Parliament Road Branch Nairobi. The respondents also refused to hand over office premises at Pioneer House and the officials opened a new one at Union office at KCB Building Jogoo Road for be able to operate claimant activities. The registrar of trade unions has now demanded annual returns and the accounts of the union to be supplied within 2 months covering January 1007 to September 2013 failure to which the claimant will be deregistered. If the claimant is deregistered this will negatively affect 8000 employees who will be without a union. The 1st to 12th respondents have been representing themselves as the claimant officials and have been collecting union dues, and operating bank account number 01020060636400 held by the 13th respondent which is illegal and should be stopped. The 1st to 12th respondent should therefore be compelled by the court to surrender the claimant books of accounts and the 13th respondent directed to file a statement of accounts held by themselves in account number 01020060636400 to enable the claimant make returns to the Registrar of Trade Unions before deregistration.

5. The 1st to 12th respondent save for the 6th respondent replied to the claimant application through their advocate Michael Owour and stated that Elijah Otieno Awach and others who filed the application were unknown to the respondents as they have been masquerading as the claimant officials which have cause the claimant union damage. That there is a faction of the claimant led by Elijah Awach since 2010 which

was sent to a conciliator on 16th March 2010. This court on 19th March 2010 ordered there be elections and on 24th March 2010 were held and report filed in court in April 2010. That no other elections have been held since.

6. On 17th April 2013, Elijah Awach and others 'manufactured' a consent which was filed in Industrial Cause No. 513(N) of 2009 and the respondents filed an application to set aside this fraudulent consent. This application is pending before court. This consent did not appoint anybody to act as the official of the claimant as replacements of the respondents. A claimant was thus filed by Elijah Awach in Cause No. 755 of 2013 seeking for an injunction against Interested Party from holding themselves as the officials of the claimant, which cause is pending before court. That the Interested parties colluded with the Registrar of Trade Union to sneak in a consent order meant to vacate the orders issued by this court. There is contempt proceeding against the interested Parties in Cause No. 755 of 2013 for disobeying the injunctive orders therein. That as a result, the claimant officials have imposed themselves as such officials in utter disregard of the fact that the respondents are the right officials. That in the interests of justice Cause No. 755 of 2013 should first be resolved before this claim can be heard.

7. On the other hand the 6th respondent in his Replying Affidavit filed on 13th January 2014 make similar sentiments as the other respondents. There is a Further Affidavit filed on 3rd February 2014 which is not signed, commissioned or dated. This will be ignored.

8. The second application filed by the 6th respondent is seeking for orders of stay the hearing and determination of this claim and application of the claimant dated 27th November 2013 pending the hearing and determination of Cause No. 755 of 2013 and in the alternative this suit be consolidated with Cause 755 of 2013 for hearing and disposal. The application is supported by the affidavit of the 6th respondent on the grounds that a claim was filed against Elijah Awach and other interested parties who are masquerading as the officials of the claimant. That the principal order sought under cause 755 of 2013 is that;

An interim order of injunction restraining the Interested parties from purporting to be officials, holding themselves as such officials or purporting to execute any duties of the claimant/applicant in the capacity exhibited by the extract issued on the 17th may 2013 or any other capacities whatsoever pending the hearing and determination of this application.

9. That this application has not been heard neither the Interested Parties filed any response to the said application or suit and instead filed an application seeking to vacate the interim orders. That the interested parties have claimed to be the officials of the claimant after sneaking a consent orders signed by themselves and the Registrar of Trade unions. That the court rejected that consent orders.

10. Further ground are that no elections of the claimant union have been conducted where Elijah Awach or any other person claiming to be officials and or behind the current claim were made the union officials. The bona fides officials of the claimant union have filed for contempt of court proceedings against those masquerading as such officials, which application is pending before court. That the interested parties have never filed their defence in cause no. 755 of 2013 and for this court to proceed without cause no. 755 of 2013 being resolved would be a miscarriage of justice.

Determination of the issues

11. I will start with the 6th respondent's application seeking;

1. *That this honourable court be pleased to stay the hearing and determination of this claim and the application dated 27th November 2013 pending the hearing and determination of case No. 755 of 2013*
2. *That in the alternative, this suit be consolidated with Industrial Cause No. 755 of 2013 of 2013 for*

hearing and determination thereof in the interests of justice.

12. The principal objective of this Court is set out under section 3(1) of the Industrial Court Act, which is to facilitate the just, expeditious and proportionate resolution of disputes before this Court. For this purpose there are the Industrial Court Procedure Rules which at Rule 23 states;

The Court may consolidate suits if it appears that in any number of suits

(a) Some common question of fact or law arises; or

(b) It is practical and appropriate to proceed with the issues raised in the suits simultaneously.

13. This Court *may*, where necessary, just and expeditious consolidate suits for hearing and disposal. The principal here is that the suits to be consolidated have common question of fact or law or there is a practical and appropriate issue that require such consolidation. Where parties agree to such consolidation of suits, the court's duty is to be seized of the issues and proceed to assess where appropriate and give directions. However where one party is totally opposed to such consolidation, then the court must assess the need and the questions before it as with regard to the separate claims and thus the need for such consolidation or non-consolidation.

14. in this case [1896 of 2013], I find the prayers being sought by the claimant are specific as outlined above. The claimant is seeking to have the books of account surrendered to them, restraint on the respondents who purport to be the claimant officials and the 13th respondent to submit a statement to account No. 01020060636400 held by them. On the other hand, the 6th respondent is seeking to stay proceedings herein and a consolidation of the suit with Cause No. 755 of 2013. Are there good grounds for a stay of proceedings and should this suit be consolidated with cause No.755 of 2013?

14. On the first part, stay of proceedings is governed by principles that must be met before such an order can be granted. The 6th respondent has stated in his replying affidavit that there will be injustice if this suit is heard separate from cause No. 755 of 2013. That is relative as the circumstance within which injustice shall be occasioned on the 6th respondent has not been outlined in the replying affidavit or in the written submissions. Coupled with this, the second part of the highlighted issue, this cause is between a union and 13 respondents whereas cause no. 755 of 2013 is between the claimant union against the Registrar of Trade Unions and 13 Interested Parties being;

Robert Mwangi Nguyo, the 1st Interested Party

Walter O. Muga, the 2nd Interested Party

Jane Mbugua, the 3rd Interested Party

Elijah Otieno Awach, the 4th Interested Party

Simon Maina Wanjiku, the 5th Interested Party

David Ruto, the 6th Interested Party

Dorothy Awour, the 7th Interested Party

George O. Olwal, the 8th Interested Party o

Simon Mwai, the 9th Interested Party

Jane Onyango, the 10th Interested Party

Libertime O. Odeny, the 11th Interested Party

Ruth Wanjira, the 12th Interested Party

Nancy Siahi, the 13th Interested Party

15. In submissions, the 6th respondent also state that there is Cause No. 513(N) of 2009 between the Union against the Registrar of Trade Unions and 4 interested Parties being;

James Muthee Ndirangu, 1st Interested Party

Simon Maina Wanjiku, 2nd Interested Party

Paul Kiprotich Koech, 3rd interested party

Elijah Awach, 4th interested Party

16. Hence there are now three (3) suits, all filed by the claimant/Union, the National Union of Water and Sewerage Employees, against various individuals, the Registrar of Trade Unions and other Interested Parties. Apart from the claim herein, in Cause No. 755 of 2013 and Cause No. 513(N) of 2009, the memorandum of claims are not attached to see the similarities as to the basis of these two other claims instituted by the same claimant the National Union of Water and Sewerage Employees. Even in case where these memoranda of claim were to be attached, the respondents are fundamentally different as cause 755 of 2013 and 513(N) of 2009 were between the claimant and the Registrar of Trade Unions, and even in a case where there was a similarity, the orders being sought by the claimant against the respondents and the interested parties are also fundamentally different as these are different entities and or individuals from which the claimant is seeking various orders.

17. The 6th respondent state that the issues herein are intertwined as the claimant herein and especially Elijah Awach and 'his team' are masquerading as officials of the claimant union having fraudulently 'sneaked' a consent into cause No. 513(N) of 2009 which has also arose in cause No.755 of 2013. I take this to be a very serious accusation. If cause No. 755 of 2013 is ongoing, this issue should have arisen, fraud is a criminal act that should have been reported to the Court and to the police. This does not seem to have happened. Similarly if there are fraudulent activities with regard to cause No.513 (N) or 2009, there is a remedy before this court and for police investigations. To make these simple averments in this cause without any tangible evidence and or support is not helpful to the cause pending for determination, cause No. 1896 of 2013.

18. The prayer on consolidation is opposed. The claimant in cause No. 513(N) of 2009, Cause No. 755 of 2013 and in this case is National Union of Water and Sewerage Employees. This claimant has filed all the three claims seeking various orders and or directions. The claimant is opposed to a consolidation of the various suits. This will be treated as such. The separate suits will be heard separately as they are at different levels and it has not been demonstrated that the cause of action is the same. The respondents and interested parties are different.

19. That said, the claimant is an entity, a Trade Union that has a legal standing to sue and be sued. As an entity I take cognisance of the fact that a Trade Union has its registered officials which record is kept and or confirmed by the Registrar of Trade Unions. The respondents herein state that they are the elected officials whereas the 6th respondent states that in cause No.513(N) of 2009 the court on 22nd August 2012 the court confirmed the status of the claimant officials which is confirmed by the Registrar of Trade Unions extract on 24th September 2012. There is also attached the Registrar of Trade union extract of 2nd May 2013 indicating who the officials of the claimant are. There is also an extract from the office of the

Registrar of Trade Unions of 17th May 2013 with a similar list of officials like the one dated 2nd May 2013. I take this to be the most recent set of officials of the respondent. The matter before me does not relate to election of officials rather, there are specific orders being sought which I must address.

20. On the application by the claimant herein, the orders sought are premised on the fact that there are current officials of the claimant who are in office but have not been able to undertake their work due to non-surrender of books of accounts and the continued operation of the respondents purporting to be the claimant officials and the 13th respondent to issue a statement of account, their account held by them. I have perused through the respondents replying affidavit and the reply together with written submissions of the 6th respondent, none respond to the issues raised by the claimant effectively. There is a preoccupation with matters not raised in this cause which could be due to the stated other suits in Cause No. 755 of 2013 or 513(N) of 2009. There is no consolidation of these other suits herein and the respondents should have focused their responses as herein. This was not successfully done.

21. There are undisputed matters in this application. There is an extract from the Registrar of Trade Unions dated 2nd May 2013 indicating the current officials of the claimant. This has not been contradicted by the respondents in their replying affidavit or in their submissions. I therefore take this as the official record as to who the officials of the claimant are. I have perused through the replying affidavits by the respondents and the submissions in court and further the written submissions of the 6th respondent. The application by the claimant is not negated in any material way by the respondents herein to warrant a rejection of the same by this court. Being the current officials of the claimant, these officials are listed as;

Robert Mwangi Nguyo – national chairman

Walter O. Muga – national vice chair

Jane Mbugua – assistant secretary general

Elijah Otieno Awach – secretary general

Simon Maina Wanjiku – deputy secretary general

David Ruto – national treasurer

Dorothy Awour – assistant national treasurer

George O. Olwalo – national organising secretary

Simon Mwai – assistant national organisation secretary

Jane Onyango – national women leaders

Libertime O. Odeny – trustee

Ruth Wanjira - trustee

Nancy Siah - trustee

22. These being the registered officials, have the right to run the affairs of the claimant Trade Union pending any other orders of this court or new elections duly registered with the Registrar of Trade Unions. This record of the Registrar of Trade Union as of 2nd May 2013 has not been challenged as being illegal. This court will rely on this record as a true position of the current status of the claimant Trade Union. With this affirmation and in pursuance to the mandate granted to registered officials of a trade union as under section 21 of the Labour Relations Act thus;

A trade union, employers' organisation or federation shall be registered as a body corporate -

(a) With perpetual succession and a common seal;

(b) With the capacity in its own name to-

(i) Sue and be sued; and

(ii) enter into contracts; and

(d) Hold, purchase or otherwise acquire and dispose of movable and immovable property.

23. Therefore, once the officials take office of the trade union, the officials should manage such a Trade Union effectively and efficiently for an on behalf of the members. Part of the running of the affairs of the trade union is to ensure that the officials render accounts and file annual returns with the Registrar of Trade Unions as per section 42 and 43 of the Labour Relations Act. Member of the trade union upon good notice have the right to inspect accounts and record as this is their trade union. Such rights should be exercised reasonably and upon good notice. In this case, there are the current officials as outlined above who have a duty to the trade union members and as mandated by the law, they are to render accounts and annual returns of the trade union to the Registrar of Trade Union. To fail to do so would render the trade union ineffective and cause deregistration jeopardising the interests of the trade union members. That would be a great injustice. This court will not sanction any injustice of whatever nature. Beyond this, this court is concerned that there remains industrial peace and will respect official record of the officials as outlined in the extract of the Registrar of Trade Unions dated 2nd May 2013.

I hereby dismiss the 6th respondent's application dated 29th November 2013 in its entirety and allow the claimant Trade Union [National Union of Water and Sewerage Employees] application dated 27th November 2013 in the following terms;

- a. The 1st to 12th respondent are herein directed either by themselves, their agents, servants and or representatives to hand over or surrender all the books of accounts and any other property in their possession of the claimant Trade Union pending the hearing of the claim herein;**
- b. The 1st to 12th respondents to forthwith cease representing themselves as the registered officials of the claimant Trade Union pending the hearing of the claim herein; and**
- c. The 13th respondent to allow the claimant Trade Union officials [as under paragraph 21 above] access to account No. 01020060636400 held at National bank, Harambee Avenue, Nairobi to enable them file annual returns with the Registrar of Trade Unions.**

These are the orders of this Court

Delivered in Nairobi and dated this 4th day of February 2014

M. Mbaru

JUDGE

In the presence of

Lilian Njenga: Court Assistant