



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA

(BIMA TOWERS)

CAUSE NO. 30 OF 2012

(Originally Nairobi Cause No. 1444 of 2010)

NELSON ONYANGO OTHO..... 1ST CLAIMANT

MICHAEL OWINO.....2ND CLAIMANT

EVANS L. LIANI3RD CLAIMANT

BENARD M. ONGATI.....4TH CLAIMANT

JACQUILINE O. OKONDO.....5TH CLAIMANT

JANE N. MBUVI6TH CLAIMANT

v

RASHID JUMAA NYALE.....1ST RESPONDENT

ROBERT ODWORI ABWOGA..... 2ND RESPONDENT

JUDGMENT

1. The Claimants filed a Memorandum of Claim against Rashid Jumaa Nyale on 22 November 2010 and the issue in dispute was stated as *misuse of money/property of a trade union, handling and or withdrawal of union funds without authority hence defrauding the entire union economically and or financially.*
2. Together with the Memorandum of Claim was a notice of motion seeking restraining orders against the Respondent from carrying out any transactions from the union account, refund of monies already withdrawn and compensation among other prayers.
3. Madzayo J, (as he was then) certified the motion urgent on 23 November 2010 and directed that it be served upon the Respondent.
4. On 7 December 2010, Madzayo J directed that the file be placed before Rika J on 18 January 2011 for directions. This was because the Judge had been informed that Cause No. 986 of 2010 in which similar issues had been raised was pending before Rika J.
5. Because the award in Cause No. 986 of 2010 was coming up on 25 February 2011, Rika J declined to consolidate the 2 Causes but directed that this Cause be listed for directions after the reading of the award in Cause No. 986 of 2010.

6. On 6 December 2012, the Cause was transferred to Mombasa after the Industrial Court was established in Mombasa and on 14 December 2012 the matter was mentioned before me. During the mention, the 2nd Claimant on behalf of the Claimants sought leave to amend the Memorandum of Claim. The Court granted leave and on 28 December 2012 the Claimants filed an Amended Memorandum of Claim which now included Robert Odwori Abwoga as 2nd Respondent.
7. The Claimants in the Amended Memorandum of Claim seek three substantive orders to wit, *that the 1st and 2nd Respondents be compelled to refund all funds of the union withdrawn fraudulently from the Unions account number 204647485 at Treasury Square between 27 June 2009 to 1 April 2011; suspending the Respondents from holding union offices and committing the Respondents to civil jail.*
8. On 22 May 2013 the Respondents informed the Court that the issues raised in the Cause were *res judicata* and I therefore directed the Deputy Registrar to call for files in respect of Nairobi Cause No. 986 of 2010 and Nairobi Cause No. 2086 of 2011. The files were called for by the Deputy Registrar through her letter dated 4 June 2013 to the Deputy Registrar, Nairobi but there is no reply to her letter on record.
9. The Cause proceeded for hearing on 25 July 2013, 23 September 2013, 30 October 2013 and 5 November 2013. The Claimants filed their written submissions on 12 November 2013 and the Respondents on 29 November 2013.

Claimants' pleadings/case

10. In the Amended Memorandum of Claim, the issue in dispute was framed as *misuse of funds/properties of a trade union, handling and or making transactions at the unions registered account unlawfully hence defrauding the entire union economically and or financially.*
11. The Claimants pleaded that they are officials/members/contributors of Kenya Shipping Clearing and Warehouses Workers Union (Union) and that the 1st Respondent had resigned as an official of the Union on 27 June 2009 but continued to sign Union cheques, while the 2nd Respondent was the Union's General Secretary.
12. Because of the needless verbosity in the Amended Memorandum of Claim, the Court will attempt to isolate the gravamen of the Claimants complaints as raised by the pleadings.
13. Firstly, it was pleaded and bank statement marked MO 6 annexed to Amended Memorandum of Claim, to illustrate that the 1st Respondent made several financial transactions in the Union's account on 25 March 2010, 31 March 2010, 7 April 2010, 7 June 2010, 11 June 2010, 27 July 2010, 15 October 2010, while he had resigned on 27 June 2009.
14. Secondly, that the 2nd Respondent received Kshs 350,000/- from the firm of Okoth & Kiplagat for ex workers of M/s Schenker on 22 March 2010, but did not pay the said money to the workers and therefore the workers filed Cause No. 603 of 2010 against the Union and 2nd Respondent for payment of the funds received from Okoth and Kiplagat Advocates.
15. Thirdly, that awards made in Cause No. 131 of 2004 were not paid to some 32 employees of TSS Transporters Ltd, forcing the ex employees to move to Court seeking the arrest of the Respondents and other officials.
16. Fourthly, that the 2nd Respondent made out cheques to one Fredrick M. Okumu on 15 August 2010, 15 September 2010 and 15 October 2010, but the Union's Treasurer refused to sign the cheques.
17. Fifthly, that the 2nd Respondent had failed to pay office expenses/allowances for Malaba, Changamwe and Nairobi branches of the Union.
18. Sixthly, that the 2nd Respondent prepared minutes and submitted the same to the Registrar of Trade Unions purporting that a National Executive Council had met on 21 August 2011 and appointed one Joseph Namai Songa as the Union's National Treasurer.
19. The Claimants called two witnesses. The first witness, Stephen Peter Amoyah stated that between 1999 and 2011 he was the Union's National Treasurer and that the union's cheque book was kept by the 2nd Respondent and that some cheques were presented to the union's bankers without his knowledge. He therefore wrote to the 2nd Respondent on 2 September 2008 seeking certain clarifications, and to the union's bankers on 8 November 2010 and 16 March 2011. He also stated

- he did not authorize the Assistant National Treasurer to sign cheques.
20. He further stated he refused to sign cheques drawn in favour of a Mr. Fredrick Okumu (he confirmed the cheques were not cashed) and that he filed Cause No. 1438 of 2011 against the Respondent and the Union to stop withdrawals from the Union's accounts. A total of Kshs 2,048,900/- was withdrawn without proper authorization.
 21. In cross examination, the first witness stated he was not aware that the issues in dispute in this Cause were the same issues in dispute in Nairobi Cause No. 986 of 2010 and Nairobi Cause No. 2086 of 2011.
 22. The Claimants second witness was Jane Mbuvi, one of the Union's trustees. She stated that the Union had not held a National Executive Council meeting in a long time and that the Claimants wrote to the 2nd Respondent on 22 August 2010 but he did not call the meeting. The Claimants thereafter called for meetings which the 2nd Respondent did not attend and he was suspended.
 23. The witness further stated there was misuse of union funds and she wrote to the union's bankers after which they decided to file a suit.
 24. In cross examination, the witness confirmed the Claimants had filed Cause No. 2086 of 2011 and denied she had misappropriated union funds.

Respondents' pleadings/case

25. The Respondents appears not to have filed a Statement of Response but a Replying Affidavit sworn by the 2nd Respondent on 21 March 2013 was filed on 22 March 2013. The 1st Respondent had also sworn an earlier Replying Affidavit on 29 November 2010, and the same was filed in Court on 30 November 2010 in response to the original pleadings.
26. The thrust of the 2nd Respondent's Replying affidavit was that this Cause is *res judicata* because the Claimants had filed Nairobi Cause No. 986 of 2010 in which the issues in dispute herein had been ventilated and a decision made by Rika J on 25 February 2011, after which the 1st Respondent left the Union, and that in Nairobi Cause No. 2086 of 2011, the Court found the Claimants guilty of mismanagement of the unions funds.
27. It was also deposed that the 1st, 3rd and 5th Claimants were not members of the Union.
28. Both Respondents gave sworn testimony.
29. The 1st Respondent stated that he was initially a trustee of the union but was later elevated and served as Assistant National Treasurer from April 2006 to June 2009. He further stated that he resigned through letter dated 27 June 2009 and that after resignation he continued to sign cheques at the request of the 2nd Respondent. Despite his resignation being notified to the Registrar of Trade Union, the witness continued, he was still a signatory to the union's bank accounts because a National Executive Council meeting to choose his replacement had not been called and the National Treasurer had refused to perform his functions.
30. He also stated that any 3 out of 4 designated signatories (Treasurer, General Secretary, Trustee and Assistant National Treasurer) could sign cheques.
31. The witness further stated that he did not sign any cheques after the decision by Rika J on 25 February 2011.
32. In cross examination, the witness confirmed that he had been replaced by one Denis Ouma Simolo as Assistant National Treasurer on 10 July 2009, but continued to sign cheques at the request of the 2nd Respondent in March 2011.
33. On his part, the 2nd Respondent told the Court that he was elected the Union's General Secretary in 2006 and was involved in an accident in 2007 leading to long hospitalization until August 2009 during which the other officials (Deputy General Secretary, National Chairman, National Treasurer, Assistant National General Secretary and Trustees) run the union until the 1st Respondent came to his house on 17 August 2009 and told him of his resignation, and that funds were being misappropriated. He further stated that he called a National Executive Council meeting on 10 July 2009.
34. On the issue of monies for employees of TSS Transporters Ltd, the 2nd Respondent stated that the National Treasurer and the 2nd Claimant had been in charge of the secretariat during his absence and that on resumption of duty he caused an audit to be carried which discovered that the Union

- had received a total of Kshs 7,592,951/10 from the said company but the same had not been paid to the employees and that Kshs 2,800,000/- was missing. He further stated that monies were borrowed to pay the employees after they sued.
35. On the issue of employees and money received from Schenker Ltd, the 2nd Respondent informed the Court that the union received Kshs 350,000/- being an award in respect of Cause No. 137N of 2009 and Cause No. 603 of 2010, and the monies have since been paid to the employees.
36. Regarding cheques/payments to a Mr. Fredrick Okumu, the witness stated that the said person was the union's Organising Secretary in Kitale and that he had agreed to advance the union Kshs 150,000/- to settle the monies owed to employees of TSS Transporters Ltd and the cheques were to repay the same, but eventually the cheques were not paid/presented for encashment. In cross examination, he stated that he would take decisions and inform the National Executive Council and that the decision to borrow money was not such decision.
37. On whether he had asked the 1st Respondent to sign/encash union cheques after his resignation, the 2nd Respondent testified that indeed that was true and he received the monies for union operational expenses because the Treasurer had chosen not to cooperate with him and kept away. In cross examination, the 2nd Respondent stated that he did not call a National Executive Council meeting to ratify the signing of the cheques by the 1st Respondent after his resignation.
38. On the question of *res judicata* the 2nd Respondent testified that the 2nd Claimant and others sued the Union in Nairobi Cause No. 986 of 2010 and the issues were similar to the ones in the present Cause.

Issues for determination

39. On 22 May 2013 the Court directed the parties to file agreed issues. The parties appear not to have agreed and therefore the Claimants filed what they thought were the 10 issues for determination on 13 June 2013 while the Respondents filed 4 issues on 22 July 2013.
40. Arising from the parties pleadings, testimony, affidavits, documents filed, statement of issues and written submissions the issues arising for discussion can broadly be collapsed into three, whether the present cause is *res judicata*, whether the Respondents were involved in misuse of union funds/properties and, if so, appropriate relief. The issue of locus will also be addressed in passing.

Whether the Cause is *res judicata*

41. Under the civil procedure framework, *res judicata* has a statutory underpinning in section 7 of the Civil Procedure Act. The section provides that

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

42. The Industrial Court is a specialized court with its own rules made pursuant to its establishing statute and generally is not bound by the Civil Procedure Act and the rules made there under. The Industrial Court Act and the Industrial Court (Procedure) Rules, 2010 make no mention of *res judicata*.
43. There is judicial and public policy/objectives as to why the doctrine of *res judicata* was underpinned by statute under the civil procedure regime. There must be finality to litigation and parties who have gone through litigation should not be taken through the same test.
44. The superior Courts have developed certain principles out of the statutory provision on *res judicata*. These are the matter must be ***directly and substantially*** in issue in the two suits, the parties must be the ***same or parties under whom any of them claim***, litigating under the same title; and the matter must have been ***finally decided*** in the previous suit (see ***James Katabazi and 21 Others v The Attorney General of the Republic Of Uganda EACJ*** cited with approval in ***Kenya Hotel Properties Ltd v Willisden Investments Ltd & 4 Ors*** (2013) eKLR and ***Wille Versus***

Michuki & 2 others (2004) KLR 357

45. In the circumstances, in my view the doctrine of res judicata is equally applicable in Causes commenced in the Industrial Court as now established.
46. The Respondents' main defence to the issues raised in the Cause was that the issues were *res judicata*. In their submissions, the Respondents cited Nairobi Industrial Cause Numbers 986 of 2010; 1444 of 2010; 2086 of 2011 and 1438 of 2011.
47. The Respondents raised the plea of *res judicata* in the Replying Affidavits sworn by the 1st and 2nd Respondents. The 2nd Respondent's affidavit annexed the awards made in Nairobi Cause No. 986 of 2010 and Nairobi Cause No. 2086 of 2011. The primary pleadings in the two Causes were not annexed however.
48. This is most unsatisfactory as the Court is not Hercules to know what was pleaded in a different suit without exhibiting such pleadings.
49. Although the Court made an order for the files in respect of the two causes to be availed this was not done. The Respondents however having participated in the two causes should have done better by producing the primary pleadings in addition to the awards.
50. From the award in Nairobi Cause No. 986 of 2010 the Court apparently addressed 6 issues and these were

Whether the 3rd Respondent should be compelled to avail to the claimants or the court all accounts with respect to the period 2006 to 2010

Whether the 3rd respondent should similarly be compelled to furnish a list of assets and liabilities of the union as filed with the Registrar of Trade Unions.

Whether the 4th respondent should be compelled to pay the claimants their salary arrears amounting to Kshs 132,500/-...

Whether the 2nd claimant should be added as a union bank signatory, and whether the 1st to 3rd respondent should be compelled to vest the funds and property of the union in the trustees

51. The award also made reference to allegations of strangers such as one Mr. Fredrick Okumu being paid huge sums of money and a former official who had resigned Mr. Rashid Jumaa Nyale being involved in running the unions account, the 1st Respondent (2nd Respondent in this Cause) not releasing monies received on behalf of members, embezzlement of Kshs 300,000/-, acting without authority of National Executive Council, failing to file returns and allegations of impropriety against the 2nd Claimant.
52. In its findings, the Court found financial mismanagement of the union and made 5 holdings three of which are material to the present Cause, one that the Treasurer be a mandatory signatory in respect of the unions accounts, two that the Registrar of Trade Unions carry out an audit for the period January 2006 to December 2010 and file a report with the court within 120 days and three, that that the Court would determine if further orders in terms of sections 41 and 47 of the Labour Relations Act would be necessary.
53. It is apparent that the issues which were in dispute in Nairobi Cause No. 986 of 2010 are the same issues in the present dispute. The present dispute would on the face of it be *res judicata*.
54. But the Court needs to discuss the other cause(s) relied upon by the Respondent before making a determinative conclusion.
55. The award in Nairobi Cause No. 2086 of 2011 relates to a claim for salaries arrears and allowances not paid to the Claimants by the Union for the period 2009 to 2011. The Claimants in the Cause were the present 1st, 2nd, 3rd and 6th Claimants and one other, while the Respondent was the Union.
56. From this award, it appears the Claimants had also sought salary arrears amounting to Kshs 132,500/- in Nairobi Cause No. 986 of 2010. This award at page 3 leaves no doubt that the award in Cause No. 986 of 2010 was later set aside and all papers filed by the Claimant struck out because the Claimants' advocate on record, Mr. Rakoro did not have a practicing certificate at the

- material time.
57. The question that the Court needs to grapple with is whether the Respondents can successfully raise a plea of *res judicata* on an award which was later set aside and pleadings struck out.
58. The issues in dispute in Cause No. 2086 of 2011, from the award by Rika J dated 10 September 2012 appear to have been salary/allowances arrears due to the Claimants totalling Kshs 937,400/-. The issues of salary/allowances or arrears thereto are not directly and substantially in dispute in the present Cause, as can be gleaned from the Amended Memorandum of Claim.
59. None of the parties and more so the Respondent who raised the plea of *res judicata* furnished the Court with the pleadings and final decision in Cause No. 1438 of 2011.
60. Nairobi Cause No. 1444 of 2010, which was referred to was never determined but was transferred to Mombasa and given the new number Mombasa Cause No. 30 of 2012 and is the subject of this decision.
61. In my view, the award in Cause No. 986 of 2010 having been set aside and pleadings struck out, the Respondents cannot successfully rely on the doctrine of *res judicata* to defeat the Claimants case. There was no final determination on the merits of the issues raised therein

Whether Respondents were involved in misuse of union funds

62. One of the complaints against the Respondents was that, the 1st Respondent at the request of the 2nd Respondent was involved in signing union cheques long after he had resigned. The 1st Respondent in his testimony admitted this allegation. His testimony was that

After my resignation I continued to sign the unions cheques. I continued to sign the cheques when I was called by the General Secretary of the union, Robert Odwori Abwoga (2nd Respondent) and told me because my replacement had not been elected I should continue signing cheques and taking the money to him. Although my resignation had been notified to the Registrar of Trade Unions, I was still a signatory to the bank account of the union.....when I resigned 3 other signatories remained....I was being called to sign the cheques after my resignation because the Treasurer Mr. Amoyah had refused to perform his tasks or sign cheques.

63. This admission was made even earlier in the 1st Respondent's replying affidavit sworn on 29 November 2010 and filed in Court on 30 November 2010. The 2nd Respondent more or less confirmed the narrative by the 1st Respondent.
64. The documents placed before the Court show that the 1st Respondent's letter of resignation was dated 27 June 2009 (MO 2a) and that on 10 July 2009, a Mr. Denis Ouma Simolo had been duly appointed as the Assistant National Treasurer (as per extract from records held by the Registrar of Trade Unions).
65. Under these circumstances, the Court cannot understand why the 2nd Respondent did not cause the said Denis Ouma Simolo to be appointed as a bank signatory in place of the 1st Respondent, who had resigned. The Court notes that the replacement was notified to the Registrar of Trade Unions barely 13 days after the 1st Respondents resignation.
66. Another complaint against the Respondents was in respect to Kshs 350,000/- received from the firm of Okoth & Kiplagat Advocates to settle a claim by some 8 members of the union against Schenker Ltd. Consent filed in Court on 23 March 2010 (MO 3) and signed by the 2nd Respondent acknowledged that the money had been paid.
67. According to the documents presented in Court, the employees/members were forced to sue the Union in Nairobi Cause No. 603 of 2010 before a decree was issued on 25 August 2011 compelling the Respondent to settle the award.
68. The 2nd Respondent has failed to show why it took over a year and another suit before the members could be paid monies which had been paid through the firm of Okoth & Kiplagat Advocates.
69. On the cheques made out to Mr. Fredrick Okumu, the 2nd Respondent acknowledged the same and stated that the decision did not require the approval of the National Executive Council. Although

- the cheques were eventually not presented for encashment, a perusal of the unions Constitution shows that the National Treasurer and the National Executive Council were supposed to be involved.
70. The Constitution of the Union has set out elaborately how and for what the funds of the union should be used and accounted for.
 71. The roles of the relevant officials have been set out. Towards this end rules 7(e), 10(d), 10(g) and 13 are germane.
 72. The 2nd Respondent did not explain why he had to call upon an official who had resigned to sign cheques to withdraw union funds when the said official had been replaced within 13 days and the Registrar of Trade Unions duly notified. Further no explanation has been given as to why the union's bankers were not instructed of the changes to amend the mandate of the signatories to the account.
 73. The Respondents merely suggested that one Stephen Amoyah who served as the National Treasurer of the Union had refused to cooperate with them in the running of the union/transacting funds. But this explanation cannot stand since rule 13 of the union's Constitution made provision for 3 signatories drawn from 4 officials to the union's bank account. In any case the constitution had provision for removal of errant officials.
 74. The Trade Unions (Accounts) Regulations are also pertinent. Regulation 6 makes it mandatory that before a payment is made out of union funds payment vouchers must be prepared.
 75. Trade union officials are elected by their respective members with clear mandates on utilization of union funds and how to account for the same. Most of the funds are from the members own subscriptions.
 76. In this regard, the governance of trade unions must be transparent and accountable. The position of a trade union official in regard to the union's funds is akin to that of a trustee.
 77. Therefore a trade union official must pass financial probity/honesty test and be transparent and accountable in the use of the funds. There can be no financial probity/honesty where an official asks a non union person to sign cheques and also fails to notify the bankers that a bank signatory has ceased to hold office and has been replaced.
 78. Considering the material placed before the Court and despite the inelegance of the drafting of the pleadings, the Court is satisfied that the 2nd Respondent was involved in misuse of the unions funds through unlawful/unauthorized transactions.

Locus

79. The Respondents suggested that 1st, 3rd and 5th Claimants were not members of the Union. This suggestion was not taken any further but in any case the Court notes that even if this suggestion was valid, the standi and or bona fides of the 2nd, 4th and 6th Claimants were not questioned

Appropriate remedies

Refund of union funds

80. The Claimants sought refund of all union funds withdrawn from the union's bank account number 204647485 at Kenya Commercial Bank Treasury Branch from 27 June 2009 to 1 April 2011. The Claimants did not precisely state how much these funds were and the relief is declined.

Suspending Respondents from holding union offices

81. The Court in the award which was struck out had contemplated taking action pursuant to section 47 of the Labour Relations Act which included suspension from holding union office.
82. The 2nd Respondent unlawfully caused the withdrawal and expending of the Union funds through an official who had long resigned and in circumstances in which another official had been chosen and the Registrar of Trade Unions notified accordingly. The union's bankers should have been equally advised of the changes by the 2nd Respondent.
83. The Court is satisfied that based on the material placed before it, the 2nd Respondent is not a fit

- person to hold such office.
84. Section 47 of the Labour Relations Act contemplates suspension of a trade union official who misuses money/funds/property of a trade union. Suspension, in this context, to my mind suggests a temporary or time bound disqualification/interruption from holding an office or performing the duties of an office. The Act does not state for how long such a suspension should be. Suspension may not be an appropriate order in itself.
85. In consideration of section 47 of the Labour Relations Act and section 12(1)(g), (3)(iv) and (vii) of the Industrial Court Act, the Court declares that the 2nd Respondent is not a fit person to hold the office of General Secretary of the Union.

Committal to civil jail

86. This prayer is misplaced and in any case the Court was not addressed on its propriety in the circumstances of this case.

Costs

87. Although the Claimants have been successful, costs do not follow the event in the Industrial Court like under the civil procedure regime. Each party to bear its own costs.

Conclusion and Orders

88. In conclusion, the order that commends itself to the Court is to find, hold and declare that the 2nd Respondent is not a fit person to hold office as General Secretary of the Kenya Shipping, Clearing & Warehousing Workers Union and order that he stands removed from holding such office forthwith.
89. Further this judgment/order should be served upon the Registrar of Trade Unions and that the Registrar of Trade Unions causes the Kenya Shipping, Clearing & Warehousing Workers Union to convene an Annual Conference to elect a new General Secretary.

Delivered, dated and signed in open Court in Mombasa on this 14th day of March 2014.

Radido Stephen

Judge

Appearances

Mr. Michael Owino, 2nd Claimant for Claimants

Mr. Mkan instructed by Obara & Obara Advocates for Respondents