



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT KISUMU**

**CAUSE NO. 53/2014**

(Before Hon. Justice Hellen Wasilwa on 30<sup>th</sup> April, 2014)

ROBERT MASESE & 2 OTHERS ..... CLAIMANTS

**-VERSUS-**

THE TAILORS & TEXTILES

WORKERS UNION ..... RESPONDENTS

**RULING**

The application before court is the one dated 13.3.2014. The application is brought by way of notice of motion brought under Section 26 and 12 of the Labour Institution Act, Section 55 of the Labour Relations Act and Section 3A of Cap 21 Laws of Kenya. The application was filed under certificate of urgency with the applicant seeking orders:-

- i. **That the application be heard *ex parte* as pertains prayer (ii) and (iii).**
- ii. **That there be an order of temporary stay of execution of the court order granted on 8.11.2013 as extracted on 13.2.2014 and in the alternative there be setting aside of the *ex parte* proceedings and consequential orders of the Honourable Court dated 8.11.2013 until the hearing and determination of the application/suit.**
- iii. **That there be an order of temporary stay of execution of the court orders granted on 8.11.2013 as extracted on 13.2.2014 and in the alternative, there be an order of variation of the said order to provide for the incumbent officials of the said respondent union to remain in office for preparation, effectuation and or dispensation of the said respondents elections as per the orders of the honourable court as the honourable may deem fit.**
- iv. **That pending the hearing and determination of this application, the status quo as on 8.11.2013 to prevail.**
- v. **That there be an order on costs.**

The application is grounded on the ground that:-

(a) **That whereas the honourable court did issue orders dated 8.11.2013 as per decree extracted on 13.2.2014, the applicants union capacity can not operate in a vacuum and as per the**

**i. Constitution of union**

**ii The Labour Institutions Act and other edifices, the said office must exist for the purposes of effecting lawful transition.**

**(b) That the respondents applicants desire to effect their constitutional right on choice of representation.**

**(c) That it has become apparent after the case proceeded without the input of the applicants for a disconnect which ought not to be visited on the.**

**(d) That it is fair and just that the case of the applicants hereby be determined on merit and they be given achance to be heard.**

**(e) That the applicants have a fair and meritorious case which ought to see the light of the day.**

**(f) That the said applicants have come to court in good faith and without undue delay.**

**(g) That the applicants followed the edict of the previous court order in Nairobi High Court Misc. Appl. No. 122 of 2006, and having conducted the elections successfully, had the returns filed with Registrar of Trade Unions – who has yet to be made a party hereby.**

**(h) That it is fair and just that for effectuation of the orders of the honourable court, or otherwise**

**i. Both parties be properly heard in full.**

**ii. Appropriate enjoinders be made.**

**(i) That it is not in dispute that the respondents herein**

**i. Robert Msese**

**ii. Gideon Mwaki**

**iii. Peter Okwogo.**

The application is further supported by the affidavit of one Charles Benjamin Mue hereby as alleged branch Secretary of applicants' Eldoret branch.

It is the applicants' case that they were not heard as a result of their lawyer on record not attending court despite putting in submissions. They aver that the mistake of their counsel should not be visited on them. They contend that it would be in the interest of justice for this court allow this application and enable a level playing ground considering all evidence on subject matter in issue.

It is their submission that there are issues to be determined which issues can only be determined if the application is allowed. Further, they aver that there are some documents including payslips and Registrar documents which were not availed to court at the time of the ruling which they submit would enable court reach a proper findings. They also submit that another issue the court should determine is whether the Registrar not being party to these proceedings can be directed to make alterations or *quasi judicial* decisions to register officials bu Form Q.

They further argue that unless this court makes interventions, there will be perils as the respondents have written to employer seeking to discontinue further deductions of Union dues and also the Registrar of Trade Union to deregister the office bearers. That the orders given by court have created a vacuum. It is also the applicants' submission that the orders to hold elections cannot be effected in the circumstances as

the elections are to be called by the branch secretary who the court ordered out. It would therefore be unconstitutional to hold elections without substantive office holders in place.

The respondents opposed this applications. They filed their replying affidavit sworn by Peter Okwogo. They contend that the application is fatally defective as the applicants seek to invoke provisions of law long repealed. Further the respondents aver that the orders sought cannot be granted as prayers 1, 2, and 5 have been overtaken by events and orders 3 does not seek setting aside of the orders but a variation of the same in order to provide for incumbent officials to remain in office. It is their submission that such orders cannot be granted as the court has already determined that the current office holders are in office unconstitutionally and therefore they have unclear hands. Further the respondents argue that orders of court are suspicion and the applicants cannot argue that they are in variance with their own Constitution.

The applicants laid blame to their advocates and the respondents argue that the applicants have not explained why their advocates failed to attend court. The respondents further argue that this notion that mistake of counsel should not be visited on an innocent litigant is not a ground to let a party avoid their responsibilities. They submitted that it is the current practice of the Law Society of Kenya that all members must be insured and must be held to account for professional negligence and disgruntled clients can sue their advocates for any professional negligence.

The respondents further submitted that the applicants are coming to court late, 5 months after the court's orders made in November 2013 and thus this is an abuse of the court process.

Having heard the submission of the parties herein, the issues for determination are as follows:-

- 1. Whether the application filed is fatally defective.**
- 2. Whether the applicants have established grounds to warrant variation or stay of the court orders granted on 4.12.2013.**
- 3. whether the orders prayed for can be granted by this court.**

On the 1st issue, is the form of the application filed before this court. The application was filed under certificate of urgency and filed by way of a Notice of Motion. The law in regard to filing of such an application is provided for under Order 45 rule 1 of the Civil Procedure Act which provides for application for review of decree or order. Under the Industrial Court Act 2011 Section 16, the Industrial Court also have power to review it's judgments, awards, orders on decrees in accordance with the Rules. It is also important to note that Sections 26 and 12 of the Labour Institutions Act 2007 was repealed by the Industrial Court Act 2011. The applicants have therefore brought this application under repealed provisions of law i.e Sections 12 and 26 of the Labour Institutions Act 2007. However, by virtue of Article 159 of the Constitution, I will not dwell so much on technicalities and so find that the failure to bring the application under the correct provisions of law is not fatally defective.

On the second issue, under Section 16 of the Industrial Court Act and rules made there under, an application for review will be allowed when there is discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge of the applicant or could not be produced by the applicants at the time the decree or order was made, or an account of some mistake or error apparent on the face of the record or for any other sufficient reason.

The applicants have not established the first two grounds about discovery of new evidence or error apparent on the face of the records. They have relied on the fact that their counsel then on record failed to attend court making it impossible for them to present their evidence as such they were condemned unheard. The question then is whether this is qualifies as sufficient reason to warrant issuance of the orders sought. As submitted by the respondents mistake of counsel should not be viewed as a ground to let a party avoid their responsibilities. This is more so true by reason that counsel must be held to account for any professional negligence and that is why the Law Society of Kenya insists on counsel taking up indemnity insurance for any professional misconduct or negligence. The applicants could as well then take up the issue of their failures to present their case on their counsel then on record.

However, it is apparent that by virtue of the counsel's absence, this court was not served with all information it required in order to arrive at a decision based on evidence of both parties.

Having analyzed as above, it is still apparent that this court gave orders in December 2013 directing that elections be held by the applicants Union within 3 months. Elections have neither been held or planned. The applicants instead chose to come to court after the expiry of the 3 months without conducting any elections and without seeking to implement this court's decision. It is this court's view that that failure is a blatant manifestation on the part of the applicants they neither wished to obey the order nor tried to do so. All they have stated is that the court's order is against their Constitution. This is a blatant disregard for the law because a court order can never be below a union's constitution. It is for this reason that I find that the orders sought cannot be granted as prayed.

I however make the following orders:-

1. **There be an opportunity for both parties to appear before this court to be heard on the modalities of the elections to be carried out and the way forward.**
2. **In the meantime the interim officials to remain in office until the 16.6.2014 when the case will be mentioned.**

**HELLEN WASILWA**

**JUDGE**

**30/4/2014**

**Appearances:-**

Ombito for claimants present

Wambua for respondents present

CC. Wamache