



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

**AT NAIROBI**

**CAUSE NO. 1693 OF 2013**

**FRANCIS AYOO OJALA**

**MWANGI PATRICK NJUGUNA**

**STEPHEN MARONGO**

**Suing as Trustees of The Aviation and Airports**

**Services Workers Union (Kenya).....1<sup>ST</sup> CLAIMANT**

**GRESEND MALIA & 9 OTHERS.....2<sup>ND</sup> CLAIMANT**

**THE AVIATION & AIRPORT SERVICES**

**WORKERS UNION (KENYA).....3<sup>RD</sup> CLAIMANT**

**VERSUS**

**BONNE NICHOLAS BARASA.....1<sup>ST</sup> RESPONDENT**

**ROBERT KUBAI LICHORO.....2<sup>ND</sup> RESPONDENT**

**REGISTRAR OF TRADE UNIONS.....3<sup>RD</sup> RESPONDENT**

**NATIONAL BANK OF KENYA.....INTERESTED PARTY**

**Mr. Mogakas & Mr. Arun for 1<sup>st</sup> and 2<sup>nd</sup> Claimants**

**Mr. Cuserwa for 3<sup>rd</sup> Claimant**

**Mr. orunga for 1<sup>st</sup> and 2<sup>nd</sup> Respondent**

**M/S Mabele for Interested Party**

**JUDGMENT**

1. This suit was brought by **Mr. Francis Oyoo Ojala, Mr Mwangi Patrick Njuguna and Stephen**

**Marongo** the Trustee of the Aviation and Airport Services Workers (Union) as the 1<sup>st</sup> Claimant. The 2<sup>nd</sup> Claimants are individual members of the union whereas the 3<sup>rd</sup> Claimant is the union itself, on 2<sup>nd</sup> October 2013.

2. The 1<sup>st</sup> Respondent is the current General Secretary of the union whereas the 2<sup>nd</sup> Respondent is the Treasurer of the union.

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed a memorandum of Reply dated 4<sup>th</sup> February 2014 on the same date.

The 1<sup>st</sup> and 2<sup>nd</sup> Claimants joined issues raised in the memorandum of reply via a statement of reply dated 12<sup>th</sup> February 2014 and filed on the same date.

### **History**

3. The history of the Claimant union paints a pathetic picture of infighting between elected union officials *interse*; wrangles between elected officials and Trustees; gross mismanagement of the affairs of the union reflected in excessive misuse of union funds; fighting over the accounts and signatories of the union; numerous aborted elections and elections followed by fiery objections; plethora of suits, applications and counter applications.

4. In short, this union has not seen peace for a long time and many attempts by the umbrella federation COTU and this Court have often brought a temporary hush in the operations of the union only for the wrangles to erupt with a vengeance shortly thereafter.

5. It would appear that, some of the Advocates for the parties have been sucked into the perennial wrangles of this union and in many respects do not reflect objectivity and desire to bring these disputes to an end to allow the union to do its core business of addressing the issues that affect the employees in the Aviation Industry.

6. A lot of bad faith, non-disclosure, and sharp practice have been noticed by the Court in the unending litigation so much that numerous orders to stop any further litigation by the parties pending resolution of the existing ones have been violated by approaching different Courts without full disclosure of other pending matters and decisions of the Court.

7. This is to hope that this decision will bring an end to this sorry state of affairs and allow the combatants to be guided by the law and the union Constitution in particular in the conduct of the affairs of the union.

It is unfortunate that many employees of the union have suffered elongated period of service without pay due to the frequent disputes on who the lawful signatories of the union accounts are resulting in Court Orders freezing the operations of the Accounts.

8. The Court may in future be inclined to use punitive measures including barring those involved from ever vying for, or holding any office of the union in addition to other measures that the Court in its discretion may consider to apply.

### **Statement of claim**

9. On 19<sup>th</sup> October 2012, the Court sanctioned a consent by the parties herein under the auspices of COTU to resolve the disputes that bedeviled the Claimant union to a point of grounding it to a halt.

10. In terms thereof,

**“.....the union’s account No. 01020061115400 at National Bank Harambee Avenue, Nairobi be unfrozen when the bank receives the mandates of the new signatories**

**namely Francis Ojala, Patrick Njuguna and Stephen Marongo in place of the previous signatories.”**

11. The new signatories are the Trustees of the union, the Claimants herein, whereas the ousted signatories are the current officials of the union, the Respondents herein inter alia.

The mandate of the Trustees in terms of the consent lapsed on 15/10/2013 as it was to last for one year.

12. Meanwhile, in terms of an order of this Court, a forensic Audit of the union accounts was to be conducted by an independent firm of Auditors to establish whether or not the accounts of the union are in order and to establish whether or not the alleged improprieties by the Trustees of the union against the officials of the union are true or not.

13. Unfortunately, the wrangling between the parties extended to the manner of and by whom the firm of Auditors was to be appointed hence very valuable time was lost in that endeavour.

As a result two sets of Audit Reports were submitted to the Court to wit;

- i. An Audit by the firm of **Ronald & Associates** appointed by the Claimants herein; and
- ii. An Audit by the firm of **Nelson and Associates** appointed by the Respondents herein.

The dispute as to which is the genuine Audit Report ranges on to date.

14. In this suit, the Claimants have relied on the Audit Report by the firm of Ronald & Associates to allege that the Report dated 13/8/2013 has evidence that the Respondents were engaged in improprieties in that the two accounts show unexplained expenses as follows:

	<u>Amount</u>
a. Year 2010	3,477,130
b. Year 2011	903,710
c. Year 2012	1,033,870
Total	<b>5,414.710</b>

(b) diversion/conversion of the union funds and or assets;

(c) lack of audit trails thereby posing opportunities for misappropriation of funds.

(d) non-deduction of statutory dues and failure to account for such dues whenever deducted.

15. The Claimants allege that, due to the foregoing, the Respondents have rendered themselves, unfit to hold any office in the union.

Furthermore, the Registrar of Trade Unions has threatened to deregister the union if the Annual Returns of the union are not submitted within two months from 25<sup>th</sup> September 2013.

The Claimants submit that the union is in grave danger of deregistration.

17. The Claimants state that there was calm and proper use of union funds during the one year of their tenure, in terms of the consent order. They seek the Court to extend this mandate for the benefit of all parties and safeguard the union from further plunder.

18. That the constitution of the union mandates the Trustees to safeguard the Assets of the union where the officials become untrustworthy as is the case here.

19. That **Section 47(2)** of the **Labour Relations Act** empower the Court to make the order sought in the following terms:

“**47(1)** The Industrial Court may .....

a. order any person who has in his possession or control any property of a trade union ..... 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. The Claimants therefore seek the following orders:

a. that the Respondents are jointly and or severally liable to the union for a sum of Kshs.10,897,710/= and should pay the same;

b. the Claimants as Trustees of the union do carry out the union’s affairs, transactions including the bank account No. 01020061115400 at National Bank Harambee Avenue in accordance with the Constitution of the union and the applicable law.

c. costs and interest of this claim.

d. any other relief the Court may deem fit.

21. It is noteworthy that the Respondents, **Bonne Nicholas Barasa**, the General Secretary; **Robert Kubai Lichoro**, the Treasurer and the Chairman, **Perpetua Mponjiwa** had been suspended from the union during the wrangles that preceded the consent order of 15/10/2013. In terms of the consent, the three (3) were reinstated to their respective positions.

22. In terms of **Clause 19** of the consent, the parties bound themselves to work in peace, harmony and stability without any further wrangles for the remaining term of their five year term until 2016 union elections.

23. The parties also bound themselves under **Clause 20** to have any official perpetuating wrangles expelled from the union leadership by the resolution of the NEC/ Finance Committee reached by consensus and ratified by the Delegates Conference.

24. It is clear that the officials of the union, and in particular the Respondents have not been faithful to the terms of the consent which remains in place to date and binds them.

### **Reply by 1<sup>st</sup> and 2<sup>nd</sup> Respondents.**

25. The Respondents deny the allegations of impropriety made against them stating that the Audit Report by the firm of Ronald & Associates is inaccurate and not conclusive as there were two sets of conflicting reports over the same accounts.

The Respondents therefore deny that they have conducted themselves in any manner to render them unfit to hold the union offices.

26. They further allege that this suit is a backdoor attempt by the Claimants to take over the leadership and control of the union.

That the elected officials are the duly mandated persons to operate the accounts of the union and run its

affairs and that Trustees only come in where the operations of the union have ground to halt or its property is threatened.

That they have the mandate of the members to run the union and not the Trustees and the Court should therefore dismiss this suit with costs.

27. The Court notes that, there was no attempt by the Respondents whether in the pleadings or by way of evidence to address the specific particulars of misappropriation of funds raised by the Claimants but have given bald responses denying the specific allegations contained in the Audit report and captured in the statement of claim.

28. The Claimants in their reply have joined issues with the Respondent reiterating the particulars of impropriety committed by the Respondents against the funds of the union.

29. Furthermore, the Claimants state that the Respondents withdrew Kshs.5,000,000/= subsequently upon the expiry of the Claimants mandate to operate the union account and did not pay the workers nor pay the monthly union bills. That this has escalated the dispute between the parties and necessitated this suit and the orders sought to protect the union from closure.

30. The Respondents did not at the hearing address these further allegations by the Trustees that they have persisted in the plunder and misappropriation of union funds.

### **Determination**

31. The Court accepts that during the one year period the Claimants operated the accounts of the union, the disputes between the parties had gone to an all time low.

32. That as soon as the mandate of the Trustees conferred on them by the consent order expired, allegations of misappropriation of union funds emerged again with a vengeance.

33. It is common cause that the union bills including the salaries to workers were last paid by the Trustees notwithstanding that the Respondents withdrew about Kshs.5,000,000/= after the expiry of the mandate of the Trustee on 15/10/2013.

34. This does not paint a good picture of the Respondents who are best placed in terms of the Constitution of the union to act in the best interest of all the stakeholders of the union and especially its members and employees.

35. It must be recognized that the Respondents had ceased to hold office until they were reinstated via the same consent order which also gave the mandate to run the account of the union to the Trustees.

36. The Court has been unable to benefit much from the Audit it had directed to be conducted due to the continued wrangling on the issue and the preparation of two Audit Reports from two different firms of Auditors which conflict in material respects.

37. The Court takes a very deem view of this issue but is not in a position to know which of the report reflects a true picture of the financial standing of the union and the activities by the Respondents questioned by the Claimants but denied by the Respondents.

38. Upon considering the entire circumstances of the case, the Court makes the following orders;

- i. The mandate given to the named Trustees, namely; Francis Ayoo Ojala, Mwangi Patrick Njuguna and Stephen Marongo, the Claimants herein to be signatories to the union Account No. 010200611154000 at National Bank Harambee Avenue, Nairobi is extended to the year 2016 and the same to expire after the union elections.

ii. That the 1<sup>st</sup> Respondent, Bonne Nicholas Barasa and 2<sup>nd</sup> Respondent Robert Kubai Lichoro be also made signatories to the said account No. 010200611154000 at National Bank.

iii. That the mandate to withdraw money from the said account be limited to any three (3) of the signatories provided the three (3) must include at least one union official and one Trustee in any given transaction.

iv. That the amounts withdrawn at any one time and its use be in terms of a schedule approved by the Finance Committee of the union and the schedule be produced at the time of withdrawal.

v. That for the avoidance of doubt, the consent order dated 15/10/2012 remains in force in all other respects save for the amendment aforesaid.

vi. That the orders of the Court freezing the account No. 01020061115400 National Bank, Harambee Avenue, Nairobi are hereby set aside only subject to implementation of (i), (ii) and (iii) above.

**Dated and Delivered at Nairobi this 16<sup>th</sup> day of May, 2014.**

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**