



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 134 OF 2012

DAMSON KHISACLAIMANT

VERSUS

JERRY OLE KINA.....1ST RESPONDENT

UNION OF KENYA CIVIL SERVANTS.....2ND RESPONDENT

REGISTRAR OF TRADE UNIONS.....3RD RESPONDENT

JUDGMENT

This claim was filed by the claimant on 31st January 2012. The claim did not contain any prayers but was filed together with a notice of motion filed under certificate of urgency seeking the following orders:-

1. This application be certified as urgent, the service be dispersed with and the application be heard ex parte in the first instance.
2. The 1st Respondent be restrained from interfering with Branch Elections and or appointing officials contrary to the Rules of the registered Constitution and the Labour Relations Act 2007 pending

Hearing and determination of this application and claim.

3. Hearing and Determination of this Application and Claim. HeThe 2nd Respondent to give directions via its Chief Executive Office or Secretary General as mandated by the Law being the authorized representative of the Union for the Branch to lawfully conduct its election in accordance with the Law according to Rule No. 7 sub-rule 11 of the Union’s Registered Constitution.
4. The The Registrar of Trade Unions be restrained from making any changes in the Register of Nakuru Branch from Elections scheduled to take place on 1st February, 2012 or any other date pending hearing and determination of application and or claim.
5. The 2nd Respondent be restrained from singing form “Q” which may be presented to him arising from the alleged election scheduled to take place on 1st February,2012 or any other date pending hearing and determination of this application and or claim.
6. The OCS Nakuru Central to execute these orders.
7. CCost of this application be provided for.

The application was heard by Justice Mukunya (retired) on 1st February 2012 and he issued the following orders:-

1. That the application be and is hereby certified urgent and heard ex parte in the first instance.
2. That an order be and is hereby issued restraining the 1st Respondent from carrying on elections of Nakuru branch and also restraining the 3rd Respondent from registering the results of such elections pending hearing and determination of this application inter partes.
3. Inter partes hearing on 14th February, 2012 at 10.00 am.
4. Claimant/Applicant to serve this order and the application upon the Respondent.

On 14th February 2012 the Claimant was granted leave to amend the Memorandum of claim. The Amended Memorandum of claim was filed in court on 27th February 2012 and seeks the following orders:-

- a. A declaration that the Claimant was properly and lawfully elected as the executive secretary, Nakuru County, on 19.5.11 having been properly and lawfully elected as the branch Secretary Nakuru Branch of the union on 16.3.11, and registered as such by the Registrar of Trade Unions.
- b. A declaration that having been elected to the said Nakuru County Executive Council, the position of secretary Nakuru branch of the union became vacant, but has not yet been filled to date.
- c. In the alternative if the Claimant was not properly and lawfully elected to the position of the executive secretary Nakuru County on 19.3.11, a declaration that he is the duly elected branch secretary, Nakuru branch, having been elected on 16.3.11, and registered as such by the Registrar of Trade Union.
- d. A declaration that the elections of the Nakuru County Executive Secretary on 1.2.12 was unlawful and against the Unions Constitution, hence null and void ab initio.
- e. An order nullifying and/or quashing the elections of the Nakuru county executive secretary held on 1.2.12.
- f. An order compelling the Registrar of Trade Unions not to act on the form Q dated 2.12.2012.
- g. Any other relief this Honourable court may deem it as just and fair to grant.
- h. Costs of the claim.

The 1st and 2nd Respondents filed their reply to the Amended Memorandum of claim on 14th March 2012. The case was heard by Justice Mukunya on 17th May 2012 when the testimony in chief and cross examination of the Claimant was taken. The case was then adjourned to 2nd July 2012 for re-examination of the Claimant. The court was however reconstituted in July 2012 resulting in the retirement of Justice Mukunya following which the case was reallocated to me.

The parties appeared before me on 24th September 2012 and agreed to proceed with the case from where it was left by Justice Mukunya. I heard the case on 24th September, 24th October, 21st November, 2012, 7th February and 6th May, 2013. The Claimant called two witnesses the Claimant himself testified as PW.1 and called Andrew Machuki Momanyi PW. 2.

The Respondents also called 3 witnesses **TOM OMONDI ONDEGO RW1, JERRY SAALI OLEKINA RW3** and **ABDUL MALIK ABDALA ALI RW2**.

Mr. Rakoro instructed by Rakoro & Company Advocates appeared for the Claimant while Mr. Odhiambo instructed by Odhiambo & Company Advocates appeared for the 1st and 2nd Respondents. Mr. Langat, the Registrar of Trade Unions appeared for the 3rd Respondent but informed the court that he would not participate in the case as the decision of the Registrar was not an issue in the case. He therefore neither filed any documents nor called or examined any witness.

The facts of this case are as follows:-

The Claimant Danson Khisa was first elected as Nakuru Branch Secretary of the Kenya Union of Civil

Servants the 2nd Respondent, in the Union elections of 2006. He was re-elected to the same position in the elections held on 16th March 2011 and was duly registered by the Registrar of Trade Unions following the submission of his name together with all other elected branch officials to the Registrar by the Secretary General Mr. Tom. Odege in accordance with the provisions of Section 34 (3) of the Labour Relations Act, 2007.

Following the promulgation of the Kenya Constitution 2010 which created counties, the 2nd Respondent Union amended its constitution to create county offices, branches and sub-branches together with the structure and officer. On 9th February 2011 the 2nd Respondent's Secretary General issued a circular to all Branch Secretaries releasing the election time table for Branch election and county elections. The Branch elections were to be held between 1st March and 30th April 2011 while the county elections were to be held between 1st May and 30th June 2011. The Nakuru Branch elections were held on 16th March 2011. It is at these elections that the Claimant was re-elected as branch Secretary.

The County elections for Nakuru Branch were conducted 19th May 2011. These having been the first county elections, they were conducted at a meeting of the Branch Executive Committee held on 19th May 2011. The Claimant as Secretary of the Branch was the convenor of the Branch Executive Committee meeting at which the elections were to be held. At the meeting, the Claimant was elected unopposed as the County Executive Secretary. The 2nd Respondent's Secretary General accordingly forwarded the names of the Claimant and John Nyachiro Mobegy as Assistant Secretary in a Notice of change of names of Officers dated 11th July 2011 to The Registrar of Trade Unions who duly registered them as such.

On 11th January 2012, the 1st Respondent Jerry Ole Kina wrote to the Claimant on behalf of the Secretary General informing him that the National Executive Board had nullified his election on the grounds that no formal elections were conducted in Nakuru County. The letter directed the Nakuru Branch Secretary to notify the Committee of the vacant county position. The letter was copied to the Registrar of Trade Unions notifying him of the decision for necessary action.

The branch subsequently organized for elections to fill the position of the Executive County Secretary on 1st February 2012 at which Abdul Malik A. Ali RW.2 was elected as Executive County Secretary to replace the Claimant.

It is these elections that the Claimant is contesting in this case.

The Claimant's case is that he was properly elected and subsequently registered as the county executive secretary for Nakuru County, that nobody raised any objection to his election and that the Secretary General of the 2nd Respondent prepared and submitted Form Q to the Registrar of Trade Unions who subsequently registered him. He states that his woes started after the Union's national elections held on 12th September 2012 at Mombasa. He was accused of supporting a rival group which did not succeed in the elections. Following the elections eleven allegations were made against him, none of which touched on the validity of his election. The branch office, which had no power to discipline him, purported to suspend him on 11th October 2011, an action the Claimant submits was null and void and in contravention of the Union's Constitution. The Claimant further submits that the National Executive Board (NEB) had no powers to nullify his election and the nullification is therefore null and void. He further states that he was never given a hearing before the decision to nullify his election, and that this is against natural justice. He seeks the quashing of the decision nullifying his election and payment of costs for the claim.

The Respondents case is that the Claimant's interim orders were served on the 1st and 2nd Respondents on 2nd February 2012 while the elections which were barred by the orders were held on 1st February 2012 hence the results of the election of 1st February 2012 are valid. It is only order No. 5 which barred the Registrar of Trade Unions from registering the new officials that is therefore in force.

The Respondents (meaning the 1st and 2nd Respondents) submit that the election of the Claimant was flawed because he was elected at the first meeting after elections conducted on 16th March 2011 hence his election was null and void *ab initio* and the processing of Form Q was based on a misrepresentation and non disclosure by the Claimant. That Article 7 (11) of the Union's Constitution provides that no person shall hold more than one elective position in the Union leadership whether the position is at national , county or branch level. That the Claimant could not hold the position of the Nakuru County Executive Secretary and Branch Secretary at the same time. That the meeting of 19th May 2011 at which the Claimant was elected having been a first meeting after elections, could not transact the business of elections.

The Respondents further submit that there was no voting by secret ballot as provided in Article 1 (a) and 2 (a) of the Union Constitution. That these glaring contraventions of the Union Constitution invalidate the elections of 19th May 2011 at which the Claimant was elected.

The Respondents submit that the nullification of the Claimants election was proper, that there were overwhelming grounds of misconduct and that the members of the Branch gave the Claimant the opportunity to defend himself. That the National Executive Board also gave the Claimant the opportunity to defend himself but found his defence wanting. That the National Executive Board has authority to supervise the Claimant as provided under Article 15 of the Union Constitution. That the decision of the National Executive Board was properly conveyed to the Claimant. If aggrieved the Claimant had the opportunity to appeal to the Central Governing Council, which he chose not to do.

On the Claimants prayers the Respondents state as follows:-

- i. That prayer 1 (one) is not capable of being granted as the Claimant seeks to be declared Nakuru County Executive Secretary and Branch Secretary at the same time, contrary to Article 7 (11) of the Union Constitution.
- ii. On the Claimant's prayer 2 that the court declares that the position of the Nakuru Branch Secretary became vacant upon election of the Claimant as County Executive Secretary and that the Branch Secretary's position remains vacant to date, the Respondents submit that the elections for 1st February 2012 which filled the two positions previously held by the Claimant were valid . The prayer is therefore not tenable.
- iii. On the prayer for nullifying or quashing the elections of 1st February 2012, the Respondents submit that the elections were lawfully and procedurally conducted and such a decision would be tantamount to interference with the smooth running of the Union and go against the Union constitution. That further the claimant is on record as stating in Court that he would not participate in Union elections if directed by the court to do so.
- iv. On the Claimants prayer to restrain the Registrar of Trade Unions from acting on Form Q dated 2nd February 2012 the Respondents submitted that since the prayer quoted the date of Form Q as 2nd December 2012 instead of 2nd February 2012, the prayer should be dismissed as there is no Form Q dated 2nd December 2012.
- v. The Respondents further state that the Claimant's case was brought to court prematurely as he could have forwarded his grievance to the Central Governing Council, that the internal dispute resolution is provided for under Section 15 of the Industrial Court Act as read with Section 12 (3) (viii) of the same Act.

The Respondents submit that section 34 of Labour Relations Act is not applicable to the Claimant's case but supports the Respondent's case to the effect that elections shall be conducted in accordance with the Union's constitution which does not provide for elections to be carried out by a show of hands. That under Section 34 (4) referral of disputes to the industrial Court are not mandatory as the section uses the word "may" .

The 1st and 2nd Respondents urge the court to dismiss the claim.

The parties have set out the issues for determination as follows:-

- i. Were there formal elections of the Executive Secretary Nakuru County on 19.5.2011 and was the Claimant lawfully elected to that position?
- ii. Did the NEB (National Executive Board) of the Union have the powers to nullify the elections of the Claimant as the Executive Secretary of Nakuru County and call for fresh elections on 1st February 2012?
- iii. Was the Electoral College to elect the County Executive Secretary Nakuru Branch properly and duly constituted and was the Notice of the meeting duly and properly given?
- iv. Is the holding by the Claimant of two elective positions of the Nakuru County Executive Secretary and Nakuru Branch Secretary of the Union Constitutional?
- v. Were the Elections of 1st February 2012 lawfully called and were the procedures duly followed making the same valid?
- vi. Were the meeting of 19th May 2011 properly and lawfully convened to make the same valid?
- vii. Are the prayers sought by the Claimant tenable in law given their duality?
- viii. What is available to the oHHHON H Hon. Court to grant the Claimant?

I will adopt the issues as framed by the parties.

1. Were there formal elections of Executive Secretary Nakuru County on 19th May 2011 and was the Claimant lawfully elected to that position?

It is not in dispute that there was a meeting of the Branch Executive officials on 19th May 2011. Notice of the meeting was issued by the Branch Secretary who was the Claimant. The meeting was composed of 17 members with one member being absent with apology. At the meeting the claimant was elected unopposed after being proposed and seconded. The meeting was presided over by one Raphael Opiyo, the Vice Chairman who chaired the meeting in the absence of the chair. A notice of the meeting was sent out on 4th May 2011 and was copied to the Secretary General and the District Labour Officer. Minute 1.0/2011 which are not contested show that the members agreed that election of the county secretary and the Assistant be conducted at the same venue.

The presiding Chairman presided over the elections. The results of the election were sent to the Secretary General who filled Form Q and sent it to the Registrar of trade Unions. The Claimant and his deputy were registered and still remain on the register to date. The Claimant was recognized by the Secretary General for all intents and purposes as shown in the various correspondence submitted by both the Claimant and the Respondents. No dispute was raised against the election or the registration of the Claimant as the County Executive Secretary of Nakuru Branch.

For these reasons I find that there were indeed formal elections on 19th May 2011 at which the Claimant was elected as the Executive Secretary Nakuru County.

2. Did the National Executive Board of the Union have the powers to nullify the elections of the Claimant as the Executive Secretary Nakuru County.

The Union's constitution does not provide for nullification of elections. Section 34 of the Labour Relations Act provides that any dispute arising from, or connected directly or indirectly to, elections held under Section 34 may be referred to the Industrial court.

Section 35 of the Act provides that the Registrar of Trade Unions shall register names of all officials and their titles, that notice giving the names and titles shall be submitted to the Registrar in Form Q within 14 days and that before registering any change of officials the Registrar may require production of any relevant evidence of the change. The Section further provides that if the Registrar is not satisfied after inquiry as to the validity of any appointment he shall not register the change. Further the Section provides that no official shall act as an official of a trade union if the person is not registered.

The powers of the National Executive Board are provided for in Article 15 of the Unions Constitution as follows:-

- a. The National Executive Board shall be responsible for the day to day running of the affairs of the Union;
- b. It shall exercise control and supervision over the individual Union's

National Officers (National, County, Branch/Sub-Branch and employees of the Union).

- c. The National Executive Board shall consist of the seventeen National Officials elected under Article 7 and sixteen regional representatives based on the former provinces.
- d. The sixteen Regional Representatives to the National Executive Board, shall be elected by the Central Governing Council, as an electoral College, from among the county representatives to the Central Governing Council.
- e. The regional representatives shall be determined along the lines of the former provinces of the Republic of Kenya.
- f. Decisions of the National Executive Board shall be binding on the Union officials, members and employees, provided that if any such decisions directly affects the rights or privileges of any member or group of members, such member or group of members may within thirty (30) days of the date of the meeting of the National Executive Board, appeal to the Central Governing Council against such decision and / or resolution.
- g. The National Executive Board shall have power to appoint such committees as it may deem prudent to do so for the efficient discharge of its functions.

None of the functions of the National Executive Board gives it power to nullify elections of any official. Article (b) only gives the National Executive Board power to “exercise control and supervision over the individual Union’s national Officers”. This is not the same as power to nullify the election of the officer which under section 34 of the Labour Relations Act is a preserve of the Industrial Court. Not even the Registrar of Trade Unions has such power.

The Respondents have urged me to find that the use of the word “may” means that Section 34(4) means that it is not mandatory. The fact that no other Union Officer or organ or the Registrar of Trade Unions has power to nullify elections means that the only option available for nullification is through the Industrial court. This is the context within which the word “may” in Section 34 (4) should be interpreted in my opinion. Black’s Law Dictionary, 9th Edition, page 1068 states that **“In dozens of cases, courts have held “may” to be synonymous with “shall or “must”, usually in an effort to effectuate legislative intent.”**

The meaning of the word “may” in Section 34(4) is that it is mandatory to refer any dispute relating to nullification of the election of a union official to the Industrial court.

For these reasons I find the argument of the Respondents without merit.

I further find that the National Executive Board of the Union did not have power to nullify the Claimant’s election.

3. Was the electoral college to elect the county Executive Secretary Nakuru Branch properly and duly constituted?

The Respondents submit that having acted as Secretary the Claimant was not qualified to be a candidate.

As I have stated above, there was a Chairman who presided over the elections. That Chairman was not the Claimant. The elections were unopposed, no dispute has to date been reported against the election of the Claimant and no objection has been raised about the minutes.

The secretary General who caused the Claimant to be registered as Executive Secretary of Nakuru county Branch had a copy of the agenda and the minutes at which the Claimant was elected.

The persons who attended the meeting were constituted as provided under Article 18 of the Unions

Constitution and all except the Chairman, attended the meeting. The Chairman was absent with apology and mandated the Vice Chairman to attend and preside over the meeting.

For these reasons I find that the electoral college that elected the Claimant as Executive Secretary of Nakuru Branch was properly and duly constituted.

4. Is the holding by the Claimant of two elective positions of the Nakuru County Executive Secretary and Nakuru Branch Secretary of the Union Constitutional?

Article 7(11) of the Union Constitution prohibits the holding of 2 elective positions. It provides as follows:-

Article 7 (11)

“No person may at any time hold more than one elective position in the Union leadership whether any such position is at the National, County or sub-branch level.”

By his letter dated 14th June 2011 addressed to all county executive Secretaries the Secretary General of the 2nd Respondent congratulated all County Executive Secretaries including the Claimant on their election following the implementation of the Union’s new constitution.

He noted that some of them were holding positions at branch level which he urged them to relinquish.

The letter is reproduced below for emphasis.

“General Circular No 84

14th June 2011

All County Executive Secretaries

Union of Kenya Civil Servants

Dear Brothers & Sisters,

RE: RELINQUISHMENT OF BRANCH LEADERSHIP

I wish to congratulate you on your election as Executive Secretaries for your respective counties following implementation of the Union’s new constitution.

Therefore, this new responsibility means you have to relinquish any position you may have been elected to at Branch level.

Following complaints from some branches, I now request those of you who are still holding branch offices to step down from your previous position to allow the Branch Executive fill the position without delay.

Once again, I wish you success in your new responsibilities and look forward to continued co-operation in conducting union affairs.

Yours in solidarity,

Tom M. Odege

Secretary General

cc. All UKCS Branch Secretaries”

By a letter dated 8th September 2011 the Secretary General wrote to the Claimant in his capacity as Executive Secretary Nakuru County directing him to arrange for filling of branch positions left vacant following Union elections. The second last paragraph of the letter reads.

“The branch Officials who were elected county secretaries and assistant county secretaries should also be replaced in the same way.”

These letters demonstrate that the Union was aware about the fact that the Claimant was holding the 2 positions following the implementation of the Union’s new Constitution which created county offices and necessitated the elections. The correspondence also show that the Claimant was not the only person holding 2 elective positions and that there were directives from the Secretary General to resolve the situation to conform to the Union Constitution.

The Claimant in his testimony stated that after his election as County Executive Secretary he relinquished his position of Branch Secretary to Josephat Nandwa in an acting capacity. This fact has not been contested by the Respondents.

In any event as I have already held above, the Claimant was registered as County Executive Secretary with the knowledge that he also held the position of Branch Secretary which he had won in the Branch elections. The option available to the Respondents was to conduct elections for Branch Secretary, and not to nullify the election of the Claimant. No evidence has been produced where the Claimant was accused by the Union of holding the two positions. The secretary General is the one who caused the Claimant’s registration in both positions by the Registrar of Trade Unions.

I therefore find that the holding of the two elective positions was a temporary situation caused by the amendment of the Union Constitution to create county offices. This was a transitional situation and did not affect validity of the election of the claimant as county Executive Secretary.

5. Were the elections of 1st February 2012 lawfully called and were the procedures duly followed making the same valid?

As far as elections for the position of County Executive Secretary held by the Claimant are concerned, the elections of 1st February 2012 were not valid as there was no vacancy in the position. The nullification of the Claimants position was invalid as that can only be done by the Industrial court. To this extent the elections of 1st February 2012 were not valid.

6. Was the meeting of 19th May 2011 properly and lawfully convened to make the same valid?

This is a repetition of issue number 1 above in which I have held that the meeting was properly and validly convened.

7. Prayers sought by the Claimant.

The Claimant sought several prayers in the amended memorandum of claim. Having addressed all the issues framed by the parties, I make the following orders:-

- 1. I declare that the Claimant was properly and lawfully elected as the Executive Secretary, Nakuru County on 19th May 2011.**
- 2. I declare that the position of Branch Secretary held by the Claimant immediately before his election as Executive Secretary Nakuru County fell vacant upon his election as such by operation of Article 7 (11) of the Union’s Constitution.**

3. I declare the elections for the position of Executive Secretary Nakuru County held on 1st February 2012 null and void as there was no vacancy in that position as the Claimant was duly registered as Executive Secretary, Nakuru County.
4. There having been no valid elections for the position of Executive Secretary, Nakuru Branch on 1st February 2012, the Registrar of Trade Unions is hereby prohibited from registering the changes in the said position as submitted in Form Q dated 2nd February 2012 by the Secretary General of the Union of Kenya Civil Servants.
5. The 1st and 2nd Respondents shall jointly and severally bear the Claimant's costs of this suit.

Orders accordingly

JUDGMENT DELIVERED IN OPEN COURT ON 9th MAY 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Odiambo for 1st & 2nd Respondents

No appearance for 3rd Respondent

No appearance for the Claimant