

REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 672 OF 2014

**RIFT VALLEY RAILWAYS WORKERS UNION
(K).....CLAIMANT/APPLICANT**

VERSUS

**RIFT VALLEY RAILWAYS (K) LIMITED.....
RESPONDENT**

RULING

1. The Claimant/Applicant's Notice of Motion Application is dated 22nd April 2014. It is supported by the Affidavit of Munayi Isaac Opondo sworn on 22nd April 2014. In the application it is averred that the grievant Mr. David Ogega was transferred to Tororo Uganda in contravention of his terms of service.
2. The Respondent is opposed and filed a Replying Affidavit sworn on 8th May 2014 as well as a Supplementary Affidavit on 23rd May 2014 by Grace Wamiti the Human Resources Business Partner (Employee Relations) of the Respondent. In the Replying Affidavit she deposed that the Respondent transferred the Claimant's member Mr. David Ogega to work in Uganda in compliance with the provisions of the letter of offer Clause 3. The Respondent denied the Court has jurisdiction to entertain the claim as the Claim did not mention the person to be affected by the order in the Notice of Motion commencing the proceedings. It was further deposed that the Claimant's member Mr. Ogega accepted the transfer and even applied for and received the relocation allowance from the Respondent. The Respondent denied abridging the rights of employees to organise or join a trade union of their choice.
3. Mr. Munayi urged the Application on 26th May 2014. He submitted that the Claimant was seeking the protection of the Court against the unlawful action of the Respondent which seeks to interfere with the Claimant Union by transferring the Deputy Secretary General of the Union to a neighbouring country. He submitted that even though the Claimant appreciates the Respondent's prerogative to transfer the employees it was their position that the transfer in question fell short of a legitimate transfer and that it was packaged in malice. He submitted that the transfer ought to have been considered against the position the putative Claimant was not a mere employee of the Respondent but an official of a legally recognised union. He submitted that the grievant has been elected as a Deputy Secretary General of the Claimant union and thus transferring him is akin to relocating the union to that country. He submitted that the institutional memory of the union is embedded in the person of the Deputy Secretary General of the Union. It was submitted that the transfer is in breach of ILO Convention 98 Article 3(1) on the right to employees to draw up their own constitution & rules and the right to elect officials in full freedom and organise themselves freely. He submitted that public authorities shall refrain from interference which will restrict or impinge the exercise of this right. He referred the Court to Article 8(1) of the Convention.
4. The Respondent was opposed to the Application and Mr. Mwenesi urged the Court to decline to grant the orders sought. The Respondent had filed a Replying Affidavit of Grace Wamiti sworn on 8th May 2014 and a Further Affidavit sworn by Grace Wamiti on 23rd May 2014. The Respondent submitted that the Notice of Motion procedure is incompetent to bring the claim before the Court as there is no claim seeking the grievants' reliefs. He urged the Court to apply the provisions of Article 159 and Article 50. It

was submitted that the dispute is about the transfer of an employee and that the Claimant had failed to place before the Court all material facts before the Court. It was further submitted that the Claimant union had failed to indicate that the employee had accepted the transfer and accepted the transfer allowance. Mr. Mwenesi submitted that the submission that the transfer amounted to transfer of the union was misplaced as the Respondent is not capable of transferring a union to another country. He submitted there was no interference with the union and the Respondent was making remittance of union dues as required.

5. Mr. Munayi in his reply stated that the Respondent was belabouring the fact the Deputy Secretary General was given a relocation allowance. He submitted that what was given was not a relocation allowance but an advance against travelling allowance. He submitted that the intimation that the employee will be disciplined was contrary to the position now obtaining in that the Court will determine the case.

6. Mr. Ogega the employee is at the center of this dispute. It is stated that his transfer is actuated by malice and is akin to transferring the union to a neighbouring country. The submission on that score must fail as no individual is a trade union. Being an official of a union does not make one synonymous with the union. The employee received the transfer allowance, he accepted the transfer and cannot come and resile that which he accepted without coercion. It would seem that at the time he came to Court he should have rejected the allowance if indeed he had not accepted to move to Uganda. While the Union may suffer the inconvenience of having the Deputy Secretary General working in Uganda for the time being the Claimant has not demonstrated the transfer was actuated by malice or that it is a scheme to destroy or limit the operations of the Claimant. It is clear that Article 41 of the Constitution must be upheld as relates to the organisation of labour at the Respondent. If the Claimant has a meeting in Nairobi the Respondent will now be required to facilitate the Deputy Secretary General in attending the meeting as at present the Industrial Relations Act will govern the interaction between the Claimant and the Respondent. It might actually work in favour of the Union to spread its gospel to Uganda. In the premises as the employee acceded to his transfer and pocketed the allowance for his transfer the Application is not fit for grant and the same is dismissed with costs. The suit should be set down for hearing as soon as possible. The Respondent should facilitate the movement of the Claimant's member to Uganda to take up his new position as directed.

Orders accordingly.

Dated and delivered at Nairobi this 17th day of June 2014

NZIOKI WA MAKAU

JUDGE