



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL CAUSE OF KENYA AT NAIROBI**

**CAUSE NO. 866 OF 2014**

1. JOPHINUS MUSINDI
2. SAMMY B CHESEREK
3. LAWRENCE KINYUA
4. ARPHAXARD KEMBOI
5. LILIAN O OSUNGA
6. LYDIAH W NGARI
7. EUNICE W GITINDI

8. JOSEPH K WANDEREVA

**NATIONAL EXECUTIVE COUNCIL COMMITTEE MEMBERS,**

**Acting for**

**KENYA NATIONAL UNION OF NURSES ..... CLAIMANT**

**VERSUS**

**SETH PANYAKO .....RESPONDENT**

**RULING**

1. On 3<sup>rd</sup> June 2014 the respondent the respondent Seth Panyako filed Notice of Preliminary objection under the provisions of Rule 14(5) Industrial Court Procedure Rules on the grounds that;
  1. The claim is frivolous, malicious and an abuse of the court process; and
  2. The claim is incurably defective and bad in law.
2. Together with this Notice, the respondent also filed a Notice of Withdrawal of the suit noting that he is the Secretary General of Kenya National Union of Nurses (KNUN).
3. In support of the objections raised the respondent stated that the application and claim dated 22<sup>nd</sup> May 2014 is fatally defective as the parties are ambiguous and cannot be granted the orders sought as they have contravened section 21 of the Labour Relations Act. That there is no known entity in the name of

National Executive Council members registered under any law and thus the claimants lack the capacity to sue herein. That the persons who have sued as claimants fail the definition of person' under section 2 of the Interpretations and General Provisions Act Cap 2 as they are not a body corporate and are an unknown entity.

4. Further that under section 19 of the Labour Relations Act, KNUN is a registered Union which withdrew the entire suit and thus there is no claim pending.

5. At the time of filing the suit KNUN national Chairman signed the claim and he is an incompetent person in the meaning of Rule 7(a) of the Industrial Court Procedure Rules. The authorised persons for a trade union are not the chairperson. That there are records from the officer of the Registrar of Trade Unions that confirm who the KNUN officials are and only the General Secretary can sue and the authorised person to execute documents for and on behalf of the Union.

6. That the orders sought cannot be granted by the court. The contentions relate to the rejection of Form Q by the Registrar of Trade Unions and where such rejection is made there can only be an appeal to the Court and not against the respondent as done herein and to file the claim as done is contrary to the provisions of section 30 of the Labour Relations Act.

7. In reply the claimants Advocate stated that the suit has been filed by the claimants as the National Executive Council members of the union and thus there is no misjoinder of any party. Eunice Gitindi was elected as an official of the union and the respondent has failed to apply to the Registrar of Trade Unions to have the new officials but have continued to allocate here with union duties. The claimants have the right to use the union address as officials and members and all the claimants have given Mr Musundi consent to file the claim and make the affidavit.

8. Once Form Q is submitted to the registrar there must be communication to indicate acceptance or rejection but once a member is elected they take office immediately. The Registrar is awaiting the Court decision in the matter to enable the acceptance of the filed Form Q with new officials. The objections herein should therefore be dismissed as the claimants are aggrieved and that is why they are in court with valid claim. The court should not give undue regard to the cited technicalities of the law as this would be contrary to Article 159(2) (d) of the constitution. There is need for a full trial to determine all the matters herein.

9. Section 20 of the Industrial Court Act gives a very interesting provision where the Court is granted general powers with regard to all matters filed before the Court. These provisions are outlined as

*20. (1) in any proceedings to which this Act applies, the Court shall act without undue regard to technicalities and shall not be strictly bound by rules of evidence except in criminal matters:*

**Provided that the Court may inform itself on any matter as it considers just and may take into account opinion evidence and such facts as it considers relevant and material to the proceedings.** [*Emphasis added*].

10. This section and part read together with section 22 creates a forum where parties can litigate on their own right and behalf or with representation by the Union or their advocate;

*22. In any proceedings before the Court or a subordinate industrial court, a party to the proceedings may act in person or be represented by an advocate, an office bearer or official of the party's trade union or employers' organisation and, if the party is a juristic person, by a director or an employee specially authorized for that purpose.*

11. Therefore a party without restrictions of technicalities can approach the court as an individual, entity or in a collective capacity. Once such a party or parties are admitted with a claim, they can opt to reply under the provisions of Rule 23 and have the suit consolidated or one person make representations for and on behalf of the other claimants.

12. However in this case the claimants have come to court as the 1<sup>st</sup> to 8<sup>th</sup> claimants and as the National Executive Council Members acting for KNUN. This is challenged by the respondent citing that they are not a body corporate and that they have no capacity to sue for KNUN since as its General Secretary he has withdrawn the suit by KNUN.

13. The Labour Relations Act is now the law that regulate trade unions, employer organisations and federations and has a preamble thus;

*... the law relating to trade unions and trade disputes, to **provide for the registration, regulation, management and democratisation** of trade unions and employers organisations or federations, to promote sound labour relations through the protection and promotion of freedom of association, the encouragement of effective collective bargaining and promotion of orderly and expeditious dispute settlement, conducive to social justice and economic development and for connected purposes.*

14. Ever Trade Union like KNUN becomes a legal entity once registration is effected by the Registrar of Trade Unions. With registration, it goes with responsibility to ensure a trade union like in this case has proper structures and annual returns to the Registrar of Trade Unions. With registration in place a Union is allowed to promote its work and be able to regulate its affairs for the benefit of its members. That requires proper management systems that ensure service delivery to all members through the established structures and all these has to be done in an environment that encourages democratisation as this is the cornerstone of unionisation all over the world. Without democratisation, a trade union will labour in vain as all efforts will be challenged with no time to engage in the development of the members.

15. To run the affairs of a union there is an authorised officer in law or a person so authorised by the authorised officer. This is the nature of trade unions so as not to defeat the purpose of such organising. Even where a party has a claim against such an entity as a trade union, such a party can lodge an individual claim as of right but when making such a claim under the entity of the union, then by operation of the law, the authorised officer has to act in that regard.

16. The drafters of the law and equally by the same getting the requisite approval by Parliament must have made consideration to the facts that trade unions have for a long time flourished while engaged in the social dialogue. Such dialogue can only be commenced by an authorised officer of the union and to leave it open to all officials as it were would defeat the very rationale of having the position of General Secretary in taking the responsibility to commence and conclude such dialogue. Therefore looking at the authority granted to this office of General Secretary, much responsibility and duty to act in good faith for the benefit of the union is indeed quite high and heavy. This does not mean the other officials of such a union have no role or should be subjected to the whims of the General Secretary. Such officials remain part and parcel of the union structures and have the responsibility to ensure there are policies and systems within which to facilitate the Union undertake its mandate. This mandate includes policy formulation to ensure accountability by all officers inclusive of the General Secretary and systems that create internal checks and balances in an open and democratic society. This is what is envisaged in democratisation.

17. In this case the issues are more complicated as the authorised officer is also the respondent in this case. The claimants have brought the suit as the Executive members of the union against the legal authorised officer as the respondent. That officer has in return filed a Notice to withdraw the suit filed for and on behalf of the union.

18. Is there a claim that can stand as filed for the union? Have the 8 claimant the right capacity to file the claim as instituted? The 8 claimants retain the right in law to institute a claim and seek as claimed but cannot do so as the union without the intricate involvement of the respondent as the General Secretary. To do so would be to defeat the purpose and preamble for unionisation and democratisation of Trade Unions. The mandate granted to the office of the General Secretary is of the nature that the office is intricately involved in every effort for and on behalf of the union and cannot be removed without causing such interference that would negate the very purpose of such an office.

19. With the above, to delve into the other issues raised in the respondent objections and noting the Notice to withdraw the suit would be mute. It would be only academic.

20. However, that said, it would be proper for the court to note the following, the various presentation made by the parties herein are indicating that the component of democratisation of KNUN and outlined under the preamble to the Labour Relations Act is wanting and things are not working as supposed to for purposes of regulation and management of the affairs of KNUN. There is need to seat and address the underlying issues. The extract from the Registrar of Trade Unions indicate the current official of KNUN as at 11<sup>th</sup> June 2014 are;

1. National Chairman is Jophinus Musundi
2. Deputy Chairman is Sammy B Cheserek
3. General Secretary is Seth Panyako
4. Deputy General Secretary is Lawrence Kinyua
5. National Treasurer is Arphaxard Kemboi
6. National Chief Trustee is Lillian O Osunga
7. Deputy National Chief Trustee is Lydia Ngare
8. National Organising Secretary is Joseph K Wandereva
9. Committee member is Henry Adolwa

21. These are persons and official of KNUN. The claimants are these national officials save for the General Secretary and Eunice Gitindi. It cannot be ignored the claim and application is against the General Secretary as the respondent by the rest of the national officials. There is a lot of retrospection that is needed within KNUN if the entity is to move forward.

22. Without delving into the issues which are now mute as noted above, I will allow the objections raised to the extent that the claim as filed by the 8 claimants cannot stand on the basis that it is filed for and on behalf of KNUN instead of the 8 claimants filing it in their own capacity. This is a right they possess and cannot be defeated by any provisions but to file as KNUN without the authorised officer will be hard to enforce as there are set mechanisms under the Labour Relations Act to address the same concerns as addressed herein.

**I will allow the objections to the extent of striking out the application and claim herein. No orders as to costs.**

**Delivered in open court at Nairobi on this 10<sup>th</sup> day of July 2014.**

**M. MBARU**

**JUDGE**

In the presence of

Lilian Njenga: Court Assistant

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