



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA
(BIMA TOWERS)

CAUSE NO. 348 OF 2014

JAMES KINYUNZU KISAKU.....1ST
CLAIMANT

JAMES MBWABI.....2ND
CLAIMANT

v

NATIONAL GENERAL SECRETARY OF THE DOCK WORKERS UNION.....1ST
RESPONDENT

NATIONAL EXECUTIVE COMMITTEE.....2ND
RESPONDENT

RULING

1. The two Claimants filed a Memorandum of Claim against the two Respondents on 31 July 2014 seeking some three substantive reliefs, briefly restraint orders stopping a Special Conference called for 2 August 2014, declaratory order that the Special Conference called for 2 August 2014 and notice convening it are a nullity and that the Respondents be stopped from conducting any further business of the Dock Workers Union until after an Annual Conference to be held in September 2014.
2. Together with the Memorandum of Claim, the Claimants filed a Motion under urgency seeking an injunction to stop the Special Conference convened for 2 August 2014 pending *inter partes* hearing and determination of the main cause. The Claimants sought a further order to compel the Respondents to comply with the Union's Constitution.
3. On 31 July 2014 the Court certified the motion urgent and stopped the Special Conference called for 2 August 2014 pending *inter partes* hearing of the motion. The Court fixed *inter partes* hearing for 1 August 2014.
4. The motion could not proceed on 1 August 2014 because the Respondents sought for time to file their papers. The Court therefore extended the order stopping the Special Conference to 6 August 2014 to enable the Respondents file their responses.
5. The motion was eventually heard on 6 August 2014 and ruling reserved to today. Prayers 1 and 2 of the

Motion naturally have become spent and the substantive prayers in the motion falling for determination are prayers (c), (d) and (e).

6. For clarity, the Court will set out the substantive prayers remaining and they are that

c) the Honourable court be pleased to issue an injunction restraining the Respondents, jointly and severally in particular the National General Secretary and the National Executive Committee from convening/and or conducting special conference scheduled for 2 August 2014 and or on any other day pending the hearing and determination of the suit.

d) The National General Secretary and the National Executive Committee be directed to obey the union constitution and ordered to call Annual Conference in September, 2014 as required by Rule 7 thereof.

e) Costs of this Application be provided for and borne by the Respondents.

Claimants' case

7. The Claimants case is anchored on the grounds on the face of the motion and the supporting affidavits by each of the Claimants.

8. Mr. Kadima who prosecuted the Claimants case submitted that the Respondents called for a Special Conference on 2 August 2014 through a circular/notice dated 12 July 2014 but omitted to indicate the place and time of the Special Conference contrary to rules 7A and 8 of the Union's Constitution as read with section 1 of appendix 2. The failure, Mr. Kadima urged would occasion prejudice to the union's membership.

9. In the view of the Claimants, the Respondents did not comply with the procedures for convening of a Special Conference because no resolution of the National Executive Committee was referred to in the notice/circular.

10. The Claimants also contend that a Special Conference can only be called when there are special circumstances to warrant the conference and which special circumstances were non-existent in the instant case.

11. The Claimants also urged that the agenda proposed for the Special Conference could be deliberated upon as a business in the Annual Conference which should be held in September as per the Union's constitution.

12. Further, the Claimants contended that the agenda for a Special Conference should be set by the Standing Orders Committee in accordance with rule 8C of the union's constitution but that the Standing Orders Committee was not appointed or constituted since 2012 when the Respondents took office.

13. According to the Claimants, the Respondents have been avoiding calling for Annual Conferences since they were elected in office in 2012 and are avoiding accounting to the union's membership.

Respondents' case

14. Mr. Ochieng, Executive Officer, Dock Workers Union urged the Respondents case. He relied on the Replying Affidavit of Simon Kiprono Sang, the Union's General Secretary.

15. The first point taken by the Respondents was that the Claimants had failed to meet the threshold for the grant of injunctive relief as set out in the case of *Giella v Cassman Brown & Bros Ltd.*

16. The Respondents also urged that the 1st Claimant had failed to demonstrate that they were members of the Dock Workers Union and further how their rights had been violated.

17. In this regard, it was contended that because the 1st Claimant had been suspended by his employer, Kenya Ports Authority and thus not paying monthly subscriptions, he was not a fully paid up member of the Union and therefore his right to attend the Special Conference had been restricted.

18. Responding to the issue on the role of Standing Orders Committee on agenda setting for Special Conferences, Mr. Ochieng urged that no member had chosen to vie for membership and therefore the Respondents had opted to appoint/nominate members to Standing Orders Committee on 18 July 2011.

19. On the position taken by the Claimants that no special circumstances existed to warrant the convening of a Special Conference, the Respondents submitted that the union's constitution allowed for the convention of such Conference and that the need for convening the Conference on 2 August 2014 was because of the plan to privatise the port and this was a special circumstance.

20. The Respondents further contended that the orders sought by the Claimants were still the subject of adjudication in Mombasa Cause No. 218 of 2014, *James Kisaku v National Executive Committee of Dock Workers Union* and therefore the present Cause was *sub judice*.

21. In the same breath, the Respondents contended that a trade union has a constitutional right to determine its own administration and programmes without interference and the Claimants were meddling with the Respondents independence to run its activities and programmes.

22. The Court, the Respondents contended should be an arbiter of last resort.

23. The last substantive contention by the Respondent was that the Claimants had moved Court prematurely. In this regard, it was submitted that the Claimants had not exhausted the internal grievance resolution mechanisms provided for in clause 28 of the union's constitution by appealing the decision to call the Special Conference.

24. Further the Respondent asserted that the Claimants should have reported a dispute to the Registrar of Trade Unions.

Reply by Claimants

25. In a brief reply, the Claimants urged that suspension of 1st Claimant by the employer did not limit his rights as a member of the Union and that the Union's constitution did not allow the Respondents to appoint or nominate members of Standing Orders Committees and its role was limited to filing of casual vacancies arising.

26. Mr. Kadima also submitted that no evidence had been presented to show privatisation of the port was imminent and that the present Cause is in respect of a Special Conference called for 2 August 2014 and thus a new cause of action different from the one in Mombasa Cause No. 218 of 2014.

27. In a parting shot, the Claimants submitted that grievances raised by the Claimants were not provided for and could not be resolved under the Labour Relations Act.

Issues

28. The issues arising in this application are whether a valid notice convening the Special Conference was issued, whether this Cause is *sub judice*, whether there is a valid Standing Orders Committee, whether there was a National Executive Committee resolution to convene the Special Conference and finally orders to be given.

29. The Court observes that the nature of the motion for determination may in all material respects determine the main Cause and the parties will be called to address the Court on the best way forward after delivery of this ruling.

Evaluation

Whether valid notice was issued

30. The 1st Respondent issued a Circular dated 12 July 2014 convening a Special Conference for 2 August 2014. The Circular set out the agenda of the Special Conference as

Privitisation of stevedoring and handling services of the Authority (Berth 1-10) and Container Operation.

Rationalisation of PAYE (Pay as You Earn).

Formation of transport federation or confederation or joining existing ones. Review of the Union Constitution.

31. The Circular also advised that a Committee and selected members from different sections would be facilitated to have a one-day sensitization after which they would help in sensitizing other members in their respective sections. National officials would also visit every department/zones to sensitise members on the same issues.

32. Rule 8 of the Union's Constitution provides for the convening of Special Conferences. A Special Conference should be convened after a resolution of the National Executive Committee. After the resolution, the General Secretary should issue a 14 day notice in writing.

33. The 1st Respondent issued a notice dated 12 July 2014 convening a Special Conference for 2 August 2014. On the face of the circular convening the Conference, there was compliance with the 14 day notice rule.

34. The Claimants also faulted the action of the Respondents in convening the Special Conference on the basis that there was no resolution of the National Executive Committee. And for this the Claimants sought to rely on rule 8A of the union's Constitution.

35. This raises the question whether a notice convening such a Conference should state that it was called pursuant to a resolution of the National Executive Committee. My reading of the rule does not lead to such a conclusion.

36. Such types of resolutions are recorded as minutes of the National Executive Committee and that should be sufficient. The Claimants did not suggest that the National Executive Committee did not meet or pass resolution to call a Special Conference.

37. The Court will now revert to the question of the contents of the circular convening the Special Conference. The Claimants urged that because the Circular convening the Special Conference did not indicate the venue and time of the Conference, this was in contravention of rule 7A as read with rule 8 and section 1 of appendix 2 of the Union's constitution and that were the Conference to proceed, the Claimants and other members would be prejudiced.

38. The Respondents in response to this contention produced a Circular dated 31 July 2014 informing the membership that besides the Special Conference called for 2 August 2014 there would be a meeting with elected leaders at Bandari College on Saturday 2 August 2014 from 9.00 am and that the Special Conference would start at 2.00 pm. It is this latter circular which informed the membership of the venue and time of the Special Conference.

39. In my view, for a notice convening a Special or Annual General Conference to be valid, it must set out the agenda, date, venue and time of the Conference and it must be issued at least 14 days prior to the date set for the meeting in case of a Special Conference and at least a week prior to date of meeting for an Annual Conference.

40. The Union has membership spread over Kenya and they are entitled by virtue of their membership to know in advance of the agenda, date, venue and time of meetings to enable them exercise their democratic rights in forging the business of their Union.

41. On this ground alone, I would find and hold that the notice or Circular convening the Special Conference for 2 August 2014 was invalid for not indicating the venue and time.

42. In view of the conclusion reached in regard to the validity of the Circular convening the Special Conference, the Court considers it not necessary to discuss or make a determination on the other issues raised by the Claimants.

43. Before concluding, the Court wishes to emphasise and note that Article 41(4) of the Constitution has guaranteed a trade union the right to determine its own administration, programmes and activities and unless there are clear breaches of a trade union's constitution or statutory provisions, the Courts and other entities should not interfere.

44. The Courts must be cautious to give trade unions leeway and a margin of appreciation to run their activities and programmes they way they wish unless they are not in compliance with the laws of the country or their constitutions.

45. Regarding the orders sought by the Claimants, the Court notes that some of the orders as couched were overbroad and if granted the way they were drafted, the Court would needlessly be interfering with the Respondents/Dock Workers Union in running its activities. Further the orders would be inappropriate as the date of the event sought to be injuncted has long passed.

Conclusion and Orders

46. From the foregoing, the Court finds and holds that the Circular convening the Special Conference was invalid for not stating the venue and time of the meeting, but in lieu of granting the injunctive relief sought the Court issues a declaratory order that the Circular/Notice convening the Special Conference for 2 August 2014 is/was invalid.

47. For clarity, the Union is at liberty to convene a Special Conference at such time it deems fit but after giving a valid notice with the agenda, date, venue and time.

48. Each party to bear its own costs.

Delivered, dated and signed in open Court in Mombasa on this 29th day of August 2014.

Radido Stephen

Judge

Appearances

For Claimants
Advocates

Mr. Kadima, instructed by Kadima & Co.

For Respondents
Union

Mr. Ochieng, Executive Officer, Dock Workers