



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 187 OF 2013

**IN THE MATTER OF: ENFORCEMENT OF BILL OF RIGHTS UNDER ARTICLE
10,22,23(3),35,36,40**

AND 41 OF THE CONSTITUTION OF KENYA

AND

IN THE MATER OF: THE LABOUR RELATIONS ACT, 2007

AND

IN THE MATTER OF: CONTRAVENTION OF THE RIGHT TO FAIR LABOUR PRACTICES

AND

IN THE MATTER OF: GAZETTE NOTICE NO. 5898 OF 24TH MAY, 2011

BETWEEN

- 1. KADILO MTWANA**
- 2. MAURICE OUMA**
- 3. SYLVESTER TAMRE & 78 OTHERS.....CLAIMANTS**

AND

- 1. CHAIRMAN AMALGAMATED UNION OF KENYA METAL WORKERS**
- 2. GENERAL SECRETARY, AMALGAMATED UNION OF KENYA METAL WORKERS**
- 3. TREASURER, AMALGAMATED UNION OF KENYA METAL WORKERS**
- 4. MINISTER FOR LABOUR**
- 5. AMALGAMATED UNION OF KENYA METAL WORKERS.....RESPONDENTS**

J U D G M E N T

INTRODUCTION

1. The claimants are members of the Amalgamated Union of Kenya Metal workers (Union) representing the Mombasa Branch of the union.
2. The union and her national official and the Minister for Labour are the respondents.
3. The dispute in this suit concerns the changes made by the respondents to the formula for levying the monthly subscription herein after called union dues for members and and Agency fees for non-members published on 24/2/2006 and 17/7/2009 vide Gazette Notice No. 1203 and 7344 respectively. The Gazette Notice no. 1203 provided deductions of union dues as follows:

“the sum equal to two per cent (2%) but not more than five hundred shillings (Ksh.500) from the monthly consolidated wage of every employee”

Gazette Notice No. 734 provided that for deductions of Agency fees as follows:

“A sum of two per cent (2%) of the basic salary or ksh.500 whichever is less of every employee covered by the terms and conditions of parties Collective Bargaining Agreement in force but not members of the amalgamated Union of Kenya Metal Workers”

4. The change in the formula of levying the monthly union dues was published on 3/6/2011 vide Gazette notice No. 5898 which revoked the said Gazette Notice No. 1203 and published the following formula for levying union dues:

“The sum equal to two per cent (2%) of the monthly consolidated wage of each employee.”

5. The Claimants being aggrieved by the minister's order in the impugned Gazette Notice, brought this suit seeking the following reliefs:

(a) A declaration that the claimant's constitutional rights under Article 10 (national values and principles of governance) and Article 41(1) (the right to fair labour practices) of the constitution have been infringed.

(b) A declaration that the orders contained in Gazette notice No. 5898 dated 24th May 2011 were made in breach of the claimant's constitutional rights and rules of natural justice.

(c) A declaration that the orders contained in Gazette notice No. 5989 are unlawful, null and void ;

(d) An order of certiorari to remove into this honorable and quash the orders contained in Gazette Notice No. 5898;

(e) An order directing the respondent to continue to make union deductions in accordance with Gazette Notice No..7344 published on 17th July 2009

(f) An order for immediate refund by the Respondents to the claimants of all dues unlawfully deducted pursuant to Gazette Notice No. 5898;

(g) such other orders as the Honourable court deems just in the circumstances.

(h) costs of and incidental to this claim.

6. The suit was disposed of by way of written submission. The minister for Labour did not participate in the hearing.

CLAIMANT'S CASE

7. The claimants submitted that the change introduced by the Gazette notice under review was the removal of the ceiling of ksh.500 as the maximum amount of union dues a member could be levied and consequently exposed the the claimants to a higher amount of union levy depending on ones consolidated salary.

8. According to the claimants the decision to “increase” the union dues deductions was made arbitrarily, unreasonably and without their input or that input of the union's Delegates.

9. On 28/1/2011, the union's General Secretary (2nd respondent) summoned the claimant's representative by mobile phone to attend a meeting at COTU offices in Nairobi on 30/1/2011. The claimant's representative attended the meeting which turned out to be the unions Central Council.

10. During the meeting, the members present were told that the union's Executive Committee wherein 1st, 2nd and 3rd respondents are members had resolved that the ceiling of ksh.500 on the union's dues deductions be removed so that the members may be charged 2% of their consolidated wages. The protest by the claimant's representatives was defeated and the ceiling of ksh.500 was removed.

11. On 26/2/2011, the union held a Delegates Conference convened by a Notice published by the 2nd respondent on 30/1/2011. Again the motion to remove the ksh.500 ceiling on the union dues was introduced at the floor of the Conference and went through and effectively ratifies the resolutions by the executive committee and the central council of the union.

12. According to the claimants, the decision to revise the levying of the union dues was unprocedural because the issue was introduced on the floor of the central council and the Delegates Conference in breach of the union constitution, Constitution of Kenya and the labour Relations Act because it was not published as an agendum on the Notice convening the respective meetings.

13. In particular the claimant contended that the decision was arrived at in breach of Article 10, 40, 41 and 47 of the constitution of Kenya which deal with good governance, protection from arbitrary deprivation of property, fair labour practice and fair administrative action respectively.

RESPONDENT'S CASE

14. The union and her 3 National officials opposed the claimant's case by contending that the impugned revision of union dues was done lawfully in meetings attended by the claimants.

15. According to the respondent about 5000 members of the union passed the resolution to revise the levying of the union dues against the opposition by 32 members mainly from Mombasa Branch of the union.

16. The respondents have further submitted that instead of suing, the claimant should have appealed against the resolution by the union to the Minister for the Labour under Section 48 of the Labour Relations Act.

17. According to the respondent's the revision of the union dues was one of the agenda published in the notice convening the Delegates Conference being the agendum on constitutional amendment.

ANALYSIS AND DETERMINATION

18. The court has perused the pleadings and the submissions filed by both sides. It is not in dispute that upto 3/6/2011, the monthly union dues for all the union's members was 25 of the members monthly consolidated pay subject to a maximum of ksh.500 as per Gazette Notice No.1203 published by the Labour Minister on 24/2/2006.

19. It is not also in dispute that the union's resolved that the ceiling of ksh.500 on the monthly union dues be removed so that members will be charged 2% of their respective consolidated pay. It is also not disputed that the said resolution by the Executive committee was subsequently adopted by the unions Central Council and the Delegates Conference.

20. Lastly it is not disputed that the resolution by the Delegates Conference to remove the ceiling of Ksh.500 on the monthly union dues was accepted by the Labour Minister through the order published on 3/6/2011 vide Gazette Notice No. 5898.

21. What is in dispute revolves around the procedure followed in arriving at the decision to remove the ceiling of the ksh.500 on the union dues. The court has summarized the issues for determination as follows:

a. Whether the decision by the respondents to remove the aforesaid ceiling of ksh.500 on the monthly union dues for union members was unprocedural and in breach of the union's constitution, the Kenya constitution and the Labour Relations Act.

b. Whether the said decision by the respondent violated the claimant's constitutional rights.

c. Whether the reliefs sought ought to issue.

Procedure

22. The claimant contention that the invitation of their representative was by mobile phone was not contested. No copy of the notice by the General Secretary convening the Central Council meeting was produced as exhibit by the respondents. Under Clause 11(d) of the Union constitution provides that the General Secretary shall issue notices and prepare the agenda of all the Conferences and meetings. That provision presupposes that all meetings by the Central Council and the Delegates Conference must be convened by a notice in writing indicating the specific agenda for discussion.

23. It follows therefore that convening the Central Council meeting on 30/1/2011 by phone was not in accordance with the union constitution. Likewise, introducing the issue of review of union dues by removing the ceiling of ksh.500 a member can pay was likewise in breach of the same constitution. The union constitution does not give the 2nd respondent or the Central Council of the union any discretion on the manner of convening and conducting the council's meetings.

24. In addition to the foregoing the court also notes that although the General Secretary allegedly issued a written notice of the Delegates Conference, the same did not specifically contain as an agenda the issue of removal of the ceiling of ksh.500 in the members monthly union dues. The notice convening the Conference has not been produced but the court believes it was containing the 4 items listed as the agenda of the Conference on page 1 of the minutes of Conference annexed as Appendix 7 to the response. The minutes did not reflect the specific provisions of the constitution that were to be amended.

25. The minutes were not signed by the secretary who made them. They were therefore suspect and lacked authenticity. However even if the court was to assume that the minutes were genuine, there is no mention of the removal of the ceiling of ksh.500 on monthly union dues for the members in the alleged minutes.

26. In view of the foregoing reasons and observation, the court is of a considered finding that the process followed by the union to remove the ceiling of ksh.500 on monthly union dues was in breach of the union constitution and the law. The General Secretary failed to issue written notice to all the members of the Central Council outlining the agenda for the meeting held on 30/1/2011. The said default denied the members of the Council the opportunity to consult with their respective branch members before attending the meeting. The court is left to presume that the reason to keep the agenda as a secret was to deny the council the opportunity to get their constituents views. The actions or omissions by the General Secretary was in bad faith and intended to ambush the members of the council who had just been elected

in the same month of January 2011. The alleged presentation of the resolution by the central council to the Delegates Conference for ratification was nothing else but window dressing which did not necessarily render the otherwise illegal exercise legal. In addition the minister's order contained in the Gazette Notice No. 5898 was also founded on an illegality and no wonder the minister did not contest this suit.

27. The court's opinion on rights of the union members is that members interests and rights should take priority. The union is not an asset for the union's National officials, especially the General Secretary who may even not be a member of the union or an employee in the industry covered by the union. It was therefore legally and procedurally wrong for the few national officials of the union to push for the removal of the ceiling of ksh.500 union dues on ground of fairness and budgetary constraints without full disclosure of the material facts or financial statements. The court agrees with the claimants that the decision on the union dues was made without prior notice and without proper consultations. It was therefore not founded on substantive information or material and therefore it was arbitrary.

Violation of Constitutional Rights

28. The claimant cited violation of their Constitutional rights to property as enshrined under Article 40 of the Constitution alleging that the increase of the union dues was tantamount to theft and arbitrary deprivation of their property. The court agrees with the claimants that the decision by the respondents was arbitrary and not a product of wide consultation. Even if the central council had the full mandate to determine the union subscriptions, such mandate was subject to procedural fairness. It was not an open cheque given the organ to write whatever amount they so desired. As earlier stated above the review of the existing levy was subject to justification based on sound financial statements and facts. In this case no such financial statements or advise were tabled at the Central councils meeting or the Delegates Conference to enable the concerned members to make informed and justifiable decisions.

29. The result of the said unlawful decision was the arbitrary removing of the ceiling of ksh.500 union dues for members and agency fees for non members which in turn condemned all the unionizable concerned workers in the industry earning a salary above ksh.25000 to pay more than the ceiling of ksh.500 which was the maximum they could pay before impugned Gazette notice No. 5898. Consequently the claimant's rights to property were violated when their lawful salary was arbitrary deducted beyond what they had earlier consented to.

30. As regards violation of right to fair labour practices, the claimant did not say much about it and as such the court will also not waste efforts on that point either.

31. Lastly the claimants have pleaded that their right to fair administrative action under Article 47 of the constitution was violated by the impugned order by the Minister published in the Gazette notice No. 5898. This right relates to fairness in the procedure followed in decision making. Suffice it to say that, members of a trade union are entitled to participate in the activities, programme and the decision making of their union under Article 41 of the Constitution. The said participation is to be done through the organs established under the union constitution and the law. However, that right is violated when such organs are not properly constituted or when they fail to operate within the confines of their respective mandates as set out by the union constitution and the law. The right is further violated when the said organs breach the mandatory procedures set out by the union constitution, the law of the land and the rules of natural justice during the exercise of their lawful mandate.

32. At the risk of repeating itself, the court has on a balance of probability formed the opinion that the process followed to reach the decision published in the Gazette notice No. 5898 was not fair and it breached the claimants rights as enshrined under Article 47 of the constitution. As earlier noted above, the central council's meeting held on 30/1/2011 was convened by telephone calls and not through written notice stating the agenda for the said meeting. Secondly the matter was again passed by the Delegates Conference on 26/2/2011 when it was not an agenda in the notice convening the Delegates Conference. Lastly the decision was not founded on any financial statements, professional advice or facts but on arbitrary abuse of office by the respondents.

Reliefs

35. As earlier stated not much was said by the claimants in prosecuting the claim for breach of Article 41 of the constitution. The court therefore makes no declaration in that regard in terms of prayer (a) in the Amended Claim.

34. The court however makes declaration in terms of prayer (b) and (c) in the Amended Claim for the reason already stated above. According to Article 2(1) and (4) of the Constitution of Kenya, the said Constitution is the Supreme Law of the Republic and binds all persons and all state organs including the respondents herein and that any act or omission in contravention of the constitution is invalid. Consequently the orders contained in the Gazette notice No. 5898 dated 24/5/2011 and published on 3/6/2011 is unlawful, null and void.

35. In view of the foregoing declaration that the impugned order is null and void, there is nothing left to quash by the order of Certiorari sought under prayer (d) in the Amended Claim.

36. The effect of the invalidation of the order in Gazette Notice No. 5898 is that the court has reinstated the order in Gazette Notice No. 1203 of 2006 and 7344 of 2009 for purposes of levying union dues and agency fees for members and non members respectively. Henceforth and forthwith, all the unionizable employee in the concerned industry will only be deducted 2% of their consolidated wages subject to a maximum of ksh.500 until such a time when the union dues and agency fees shall be lawfully revised.

37. The prayer for refund of all the dues unlawfully deducted pursuant to the now invalidated order and Gazette notice No. 5898 is not granted. The reason for declining the order is because the amount and the affected beneficiaries is unknown. It is cardinal principle of law that special damages must not only be pleaded but must also be proved. In this case the amount for refund was never pleaded nor was any evidence adduced in support.

DISPOSITION

38. By now it is obvious that judgment must be entered for the claimant in the following terms:

- a. The orders contained in the Gazette notice no. 5898 dated 24/5/2011 and published on 3/6/2011 is declared to be unlawful, null and void *ab initio* for having been made in breach of the union constitution and the claimant's constitutional rights and the rules of natural justice.
- b. The orders contained in the Gazette notice No. 1203 dated 9/2/2006 and No. 7344 dated 9/7/2009 relating to levying of union dues from the union members and Agency fees from non-members are resisted forthwith.
- c. The claimants will have costs of the suit considering the heavy burden they had to bear in hiring counsel to represent their colleagues successfully. The costs shall be paid by the union.

Signed, dated and delivered this 26th September 2014

O. N. Makau

Judge