



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO. 1419 OF 2014

WILLIAM OPONDO1ST CLAIMANT
SIMON ISULUTI.....2ND CLAIMANT
KENYA HOTELS & ALLIED WORKERS’ UNION.....3RD CLAIMANT

VERSUS

DAVID MULI1ST RESPONDENT
PATRICK SHIKUKU.....2ND RESPONDENT
NICHOLAS ZANI.....3RD RESPONDENT
JAMES BITOK.....4TH RESPONDENT
EQUITY BANK5TH RESPONDENT

RULING

1. The suit herein commenced by application filed under Certificate or Urgency filed by CM Ongoto Advocates for the Applicants/claimants on the **30th July 2014** and another filed on 21st **August 2014**. To this application was a Notice of Motion seeking various orders where some were granted in the interim. The applicants/claimants were listed at William Opondo, Simon Isuluti and Kenya hotels & Allied Workers’ Union. The respondents were listed as David Muli, Patrick Shikuku, Nicholas Zani, James Bitok and Equity Bank. This application was set for hearing. This application is supported by the annexed affidavit of William Opondo the 1st Applicant/Claimant in his capacity as the national Chairman of the 3rd Applicant/Claimant.
2. On 4th September 2014, John Simiyu, the Industrial Relations Officer of the 3rd Applicant/Claimant, filed a new application under Certificate of Urgency seeking various orders being;
 - a. *That the honourable court be pleased to declare the 3rd Applicant/Claimant withdrawn from this suit.*
 - b. *That the honourable court be pleased to stay the execution of orders restraining the operations of the 3rd Applicant/Claimant Account No. [particulars withheld] and others.*
 - c. *Those costs of this application are provided for by the 1st and 2nd Applicant/Claimant.*

3. This application is supported by the annexed affidavit of **Nicholas Zani**, the 3rd Respondent and the Acting Secretary General of the 3rd Applicant/Claimant.

4. The court certified the same as urgent and directed the parties to be heard together with the pending application dated 20th August 2014 and filed on 21st August 2014. Hearing was scheduled for the 10th of September 2014.

5. On 9th September 2014, John Simiyu, the Industrial Relations Officer of the 3rd Applicant/Claimant filed a Withdrawal Notice noting;

Take notice that the 3rd Applicant/Claimant Union herein Kenya Hotels and Allied Workers' Union have revoked the firm of CM Ongoto and Company Advocates from representing them from this suit. The 3rd Applicant/Claimant will be represented by authorised industrial relations officers.

Take further notice that all future correspondence and process of court relating to this matter should not be addressed by the said firm of Advocates.

6. On 10th September 2014, the court heard the parties and gave directions on the mode of hearing the two pending application on the 29th September 2014. On the scheduled date, Advocate for the 5th Respondent Equity Bank were not opposed to either application and were thus exempted from further court attendance. Hearing was then scheduled at 2pm.

7. At the appointed hour, CM Ongoto Advocate was not present and court proceeded to hear John Simiyu, Industrial Relations Officer of the 3rd Applicant/Claimant on his application dated 14th September 2014.

8. The application is based on the grounds that the firm of CM Ongoto and Co Advocates has not been authorised at any time to sue on behalf of the 3rd Applicant/Claimant, the national Executive Board members have not authorised any law firm of CM Ongoto to make this suit in this honourable court on behalf of the 3rd Applicant/Claimant, that the national executive board has not sanctioned any law firm to file the suit as the suit is in breach of the 3rd Applicant/Claimant constitution. Under the Labour Relations Act, the suit is defective and the orders sought will prejudice the 3rd Applicant/Claimant as it is contrary to article 41 of the Constitution where CM Ongoto acts for the interests of the domestic union, KUDHEIHA in Petition 5 of 2013 in the Matter of Kenya Hotels and Allied Workers Union versus the Ministry of Labour and 3 others against the 3rd Applicant/Claimant and therefore cannot be trusted.

9. The affidavit of Nicholas Zani in support of the application is that as the acting Secretary General of the 3rd Applicant/Claimant, he has not received any request from any member seeking to inspect the operations of the Union especially account number [particulars withheld] held by Equity Bank, the 5th Respondent as under section 44 of the Labour Relations Act. The 1st and 2nd Claimants have not filed any request with his office to check the records and accounts or made complaints to the national Executive Board. He has maintained proper accounts of the union. The Registrar of Trade Unions has not been notified by the 1st and 2nd Claimants of any misuse of funds as required under section 31 of the Labour institutions Act. The law firm of CM Ongoto and Co Advocates has not been authorised by his office or the National Executive Board to make this suit which now wishes to withdraw this suit and has thus authorised John Simiyu to act for the 3rd Claimant Union in this matter.

10. The 5th Respondent had filed their Replying Affidavit sworn by Andre Terry the Operations Manager on the 23rd September 2014 noting that the 3rd Claimant is their client and holder of account number [particulars withheld] at Harambee Avenue Branch. The account is operated by the 1st to 4th respondents upon receipt of letter by the Registrar of Trade Union dated 25th April 2014 where the 1st to 4th respondents had been appointed to operate the 3rd claimant's account held with them.

11. Ongoto Advocate for the Claimants replied that the applicant John Simiyu is masquerading as the 3rd Claimant industrial relations officer which is not true as he has not been appointed as such and there is no dispute has been reported to the Minister. John Simiyu has no capacity to order the 3rd Claimant to withdraw the suit as he was instructed by the chairman, the 1st claimant. The 1st Claimant has authority under the constitution to convene meetings and sign all cheques. The treasurer has come to court to stop all transactions on the Union account to avoid misappropriation as John Simiyu is not an authorised officer to sign cheques or held 3rd Claimant funds.

12. What is clear is that there are several suits involving the parties herein, one such suit being **Cause No. 2048 of 2013, Joanes Owino Okoth (Secretary General), Samuel Munguti (national Treasurer) and Kenya Hotels and Allied Workers' Union versus David Muli and 16 others**. The office of the Registrar of Trade Unions has been busy addressing matters with regard to the 3rd claimant.

13. On **28th March 2014**, the officials of the 3rd Claimant were listed as;

1. William Opondo – National Chairman
2. David Mutuku Muli – National Vice Chairman
3. Joanes Okoth – national Secretary General (Suspended)
4. Nicholas Zani – Acting National Secretary General
5. Livingstone Abuta – Deputy Secretary General
6. Samuel Munguti – national Treasurer (suspended)
7. Patrick Shikuku – Assistant National Treasurer (Acting National Treasurer)
8. Wilson Kimurata – National organising Secretary
9. Elijah Musembi – Assistant National Organising Secretary
10. Simon Isuluti – National Trustee
11. James Bitok - national Trustee
12. Alfred Nyongesa - National Trustee (suspended)
13. Peter G Otieno „
14. Balon Mweni „
15. Wycliffe M Sava „
16. Jeremiah O Onditi „
17. Simon K Mwangi „
18. Thomas M Mwachete „
19. Fredrick M Mwiruri „
20. Josphat A Lweyna „
21. Renson K Kiunga „
22. Patrick K Karanja „ (suspended)
23. Chadwick Oloto „ (acting Board member)
24. Ann Andai „ (Acting Board member)
25. Ebby J Mukasia „
26. Douglas Konga „
27. Daniel Okumu „
28. Lewis Mugira „
29. Lucy Mertha Kitungo „
30. Gamaliel O Namale „
31. Susan Kili „

14. On 23rd September 2014 the Registrar of Trade Unions confirmed the same list of 3rd Claimant officials with no new changes. Thus the national officials at the helm of the 3rd Claimant are William Opondo as chairman, Nicholas Zani as the Acting Secretary General and Patrick Shikuku as the Acting national treasurer and each have their assistant or vice respectively. Thus when the 5th Respondent received communication from the Registrar of Trade Unions with respect of persons authorised to handle the property of the 3rd claimant, therein was listed;

- a. Nicholas Zani as Acting Secretary General

- b. Patrick Shikuku as Acting Treasurer
- c. David Muli as vice Chairman and
- d. James Bitok as a Trustee.

15. The letter of introduction to the Registrar of these officials is the one dated 17th April 2014 signed by Nicholas Zani as the Acting Secretary General. Attached are minutes of a meeting held on 5th April 2014 chaired by David Muli as the Vice Chairman noting that the national chairman was absent without apologies. At this meeting it was resolved to make changes to the bank signatories being account Number [particulars withheld] held by the 5th Respondent with the removal of;

- a. Joanes Owino Okotch with that of Nicholas Zani as Acting Secretary General
- b. Samuel Munguti with that of Patrick Shikuku as Acting Treasurer
- c. Simon Isiluti with that of James Bitok as a Trustee.
- d. William Opondo with that of David Muli as vice Chairman.

16. The returns from the Registrar of Trade Union indicate the National Chairman of the Union is William Opondo. The returns also indicate there are several suspended officials. The national chairman is not one such official as suspended. William Opondo remains the Chairman of the Union.

17. According to the Union constitution, there is the National Executive Board responsible for the management of the affairs of the Union with authority to exercise control over the individual officers of the Union. This National Executive Board comprises of the National chairman, Deputy National Chairman, Secretary General, deputy Secretary General, National Treasurer, Deputy National Treasurer, national organising Secretary, Deputy National organising Secretary, three trustees and 18 members. The National chair has his functions outlined under the Union constitution.

18. With regard to the application before court seeking to withdraw the suit and that the firm of CM Ongoto has not been authorised to act for the 3rd claimant, I note that under the Labour Relations Act there is a clear distinction between who a trade Union *officials* and *officers* are. This distinction is important to revisit. Section 2 of the Labour Relations Act stipulates as follows;

“Officer” when used with reference to a trade Union or employers’ organisation, means a person employed by that trade Union or employers’ organisation;

“Official” when used with reference to a trade Union or employers’ organisation, means a duly elected official of a trade Union or employers’ organisation including a member of the executive and a branch

19. Officials are elected while officers are employees. The elected official has a specific mandate for and on behalf of the Union members and this cannot be negated by provisional measures made by any officer employed for the purpose of implementing decisions of officials charged with policy and oversight mandate over the union. See **Jophinus Musundi and Others versus Seth Panyako, Cause No. 866 of 2014.**

20. This distinction between who is an official and who and officer is also given emphasis by the Act as an official has statutory duties they must perform;

2. In this Act, unless the context otherwise requires -

“Authorised representative” means –

(a) The general secretary of a trade union;

...

(e) Any person appointed in writing by an authorised representative to perform the

Functions of the authorised representative.

21. Therefore there are functions that are legally the mandate of the authorised representative of a union, being the general secretary. Where the general secretary is not able to act, then any person appointed in writing by an authorised representation to perform functions of the authorised representative. Such appointed person can thus be discerned from the Union constitution or any written authority granted to a person so appointed.

22. What is clear in these proceedings is that the Acting Secretary General of the 3rd Claimant is also a Respondent in this matter. This is the authorised representative of the 3rd Claimant in law. Can he be sued or sue?

23. This is a right that is inherent in all judicial proceedings. Any person, a Union official or officer can be sued or sue in that capacity as an official or officer. In this case however it is complicated as the 3rd Claimant union, has filed a claim against its own authorised officer. An officer of the 3rd Claimant has applied to have the suit dismissed as the advocate appearing for the Union is not authorised.

24. The only legal representative of the 3rd Claimant Union is its secretary general. The application of the officer John Simiyu is supported by the Affidavit of the 3rd respondent, the Secretary General of the union. Such action by an officer of the Union who is not the authorised officer must be undertaken with the written appointment to do so. The attached affidavit of the 3rd respondent, though the secretary general of the Union is technically a written authority for the grant of such appointment. An affidavit has its unique and peculiar application in matters such as this one before court. The appointment contemplated under section 2 of the Labour Relations act is not to be replaced in a casual manner as the responsible official or the officer has purported to do. This is more so with regard to the fact that the secretary general of the Union is sued as a Respondent in this case. The shroud of the office and the functions of such an office must be removed and respond to the case against him with a view of meeting the ends of justice and not circumventing the same. This will not be condoned.

25. The manner and approach of the officer, John Simiyu warrants mention. As the industrial relations officer of the union, he must be aware that such a position is senior and bears great responsibility. It must not be abused at will to the detriment of Union affairs. Such office must be used with great caution. Approaching the court casually simply because he has the backing of the secretary general is absurd. The secretary general is the authorised official to act and represent the Union at all material times and in his absence, make reference to the Union constitution. The returns by the Registrar of Trade unions as outlined above indicate there is a chairperson, William Opondo, there is the Livingstone Abuta, the Deputy Secretary General, officials outlined in the constitution as persons who may act for and on behalf of the union.

26. The Union has its officials registered with the Registrar of Trade Unions. These are the persons to take charge of running the Union as outlined under the Union constitution. As the claim herein is still pending, I will not delve into its merits.

Without the requisite appointment, John Simiyu becomes a stranger in this cause and the application filed by him as an industrial relations officer or under any other name and title bears no value. The application dated 4th September 2014 is hereby dismissed. John Simiyu will personally bear the costs herein to the claimants.

Delivered in open court at Nairobi this 7th day of October 2014.

M. Mbaru

JUDGE

In the presence of:

Court Assistant: Lilian Njenga

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