



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**CAUSE NO.1265 OF 2014**

**STEPHEN MUTWIWA MASIKA..... 1ST CLAIMANT**

**JAMES NJIHIA..... 2ND CLAIMANT**

**SIMON KIGALU..... 3RD CLAIMANT**

**TRANSPORT WORKERS’ UNION (KENYA)..... 4TH CLAIMANT**

**VERSUS**

**TITUS W KHAEMBA ..... 1ST RESPONDENT**

**REGISTRAR OF TRADE UNION ..... 2ND RESPONDENT**

**RULING**

1. The ruling herein is with regard to the 1st Respondent application dated 4th September 2014 brought by way of Notice of Motion under the provisions of section 3 and 12 of the Industrial Court Act, Rule 16 and 27 of the Industrial Court (Procedure) Rules seeking for orders that the Union ’s bank account at Barclays Bank Account Number 28-30-23-8 and or any other bank account being held by the Union be frozen pending the hearing and determination of the 1st respondent’s application and the main claim and that the 1st Respondent be introduced as a signatory to the account. The application is supported by the annexed affidavit of the 2nd respondent. The Claimants replied to the application vide Replying Affidavit sworn by the 1st Claimant as the national Chairman of the 4th Claimant Union. There is no reply by the 2nd respondent, the Registrar of Trade Union despite evidence of service upon the office.

2. The 1st Respondent application is on the grounds that he is the Deputy general Secretary of the 4th Claimant while the 3rd claimant, Simon Kigalu who was the General Secretary of the 4th Claimant is now deceased and there is need for the Union to continue carrying out its operations in line with its Constitution . The 1st and 2nd claimants are operating the accounts of the Union contrary to the provisions of the Union Constitution by barring the 1st Respondent as a signatory therein, and being the chief executive officer of the Union, he is the authorised person so to act and not the claimants. That there is an imminent danger the funds of the Union will be embezzled, misappropriated and misused by the claimants who are running the accounts of the Union without regard to the Union Constitution and orders sought herein will act to prevent such danger.

3. The 1st Respondent therefore further states that the operations of the Union are guided by its Constitution and the applicable law where the general Secretary of the Union is now deceased there is no gap as article 15(e ) of the Union Constitution apply by replacing the deceased officer with the deputy general secretary, the 1st respondent. This is to ensure that the 1st Respondent is included as a signatory to the Union bank account held at Barclays Bank Account Number 28-30-23-8 and or any other

accounts of the Union. The 1st Respondent despite being the chief executive officer of the Union by virtue of the death of the general Secretary and being the deputy general secretary, the Union account now being administered by the 1st and 2nd claimants is illegal. The deputy general Secretary of the Union exercise all powers and rights under article 15(e) of the Union Constitution in the absence of the general Secretary who is now deceased. While the general Secretary was hospitalised, the 1st and 2nd claimants in collusion with some other members of the Union have been making all efforts to usurp the powers and functions of the office of general Secretary and deputy general Secretary effectively frustrating the 1st Respondent from undertaking his Union functions and roles as under the Constitution mandated to do.

4. That the registrar of trade Union has made efforts to guide the Union on its operations but the 1st and 2nd claimants are bent on illegally running the Union in blatant disregard of the applicable Constitution. All cheques for withdrawal of money are to be signed by the national treasurer, national chairman and general Secretary or their assistants if for one reason or the other, one of the principal officers is not available. On 28th July 2014, the Union served a copy of minutes and resolution of the Union for purposes of effecting a change of signatories to the Union bank account, Barclays Bank Account Number 28-30-23-8 and the bank required that the 1st Respondent be introduced to the bank by the current signatories, the 1st and 2nd claimants, but have refused or neglect to do so. In the absence of the general secretary, the deputy general Secretary is the mandated officer to act as such which included taking charge of the Union funds. This has been confirmed by the Registrar of Trade Union s but the claimants are adamant and refuse to comply.

5. In reply, the claimant's state that the orders sought of freezing the Union accounts will paralyse operations of the Union as this is the account that all funds of the Union are received and used for the purpose of Union activities. The 1st responding should not be included as a signatory to the bank account Barclays Bank Account Number 28-30-23-8 since there are enough signatories and the account is fully operational. The 1st Respondent has usurped the powers of the general Secretary whereas the Union Constitution requires that where an official is dead, a meeting of Central Council must be convened to appoint a person to fill the vacant position. This being an elective position, there is no guarantee that the 1st Respondent will assume the position automatically. Equally the Union chief executive officer must be appointed by the Central Council and the 1st Respondent remains the Deputy General Secretary until otherwise elected. Rule 5 of the Constitution allow the claimants as the principal officers to be signatories of the Union bank account and in their absence, any of their assists.

Issues for consideration;

**Whether the Court should order the freezing the Union account at Barclays**

**Bank Account Number 28-30-23-8 pending the hearing of the suit;**

**Whether the 1st Respondent should be included as a signatory to Barclays**

**Bank Account Number 28-30-23-8 pending the hearing of the suit.**

6. From the onset it is important to re-state the law which may be obvious but from the submissions, I note each party herein has different interpretations. Union funds are a heavy subject in any suit as such funds form the net property of the Union. Such funds are therefore to be protected. This property vest in the Union trustees. The officials and officers of a Union only manage this resource for and on behalf of the members. This is as envisaged by the law regulating Union s in Kenya, the Labour Relations Act. At section 37

*37.(1) All property, whether movable or immovable, of a registered trade Union , employers' organisation or federation shall vest in its trustees for the use and benefit of the trade Union , employer's organisation or federation and its members.*

7. For posterity, the labour Relations Act does one important thing where is defines and separate as to

who an *officer* and an *official* for purposes of trade Union is. These two positions are outlined as;

*“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 official;*

8. One being an employee and the other being elected. The role and duties of an officer would therefore be with regard to terms and conditions given to an employee as against the role and duties of an official that would be outlined under the Constitution of the Union. The two being different in functions but mutually complimentary.

9. Thus whether the Union funds are for application by an official or officer is important to note Such funds and or property of the Union are to be used for the matters as set out under section 39 of the Labour Relations Act or on matters agreed upon and set out under the Union Constitution, matters which cannot go beyond the legal minimum. Where there is therefore any misuse of such property or funds, any party with such knowledge is to apply the provisions of section 41 of the Act. Even where matters are to be reported to the Registrar of Trade Union, only the Court can cause orders of immediate application which orders if ignored or disregarded have the consequences of contempt.

10. That said, apart from the applicable law, the 4th Claimant Union herein has a Constitution. Rule 5 of the Constitution outline how the funds of the Union are to be managed. The national treasurer like the 2nd Claimant is the principal officer so entrusted with the responsibility of managing the funds of the Union together with signing all cheques for withdrawal of money from the Union account together with the national chairman and General Secretary or their assistants if for one reason or another, one such principal officers are not available.

11. The Constitution of the Union does not define who an ‘official’ is or who an ‘officer’ is for purposes of these terms begin applied by the Union. The term ‘assistant’ is equally not defined. We however have the legal definition of who an ‘officer’ and ‘official’ are. Looking at the various organs of the Union, the delegate’s conference is the highest while the Central Council is set out as the governing organ of the Union which directs the executive committee and national officers tasked with the daily management of the Union. It comprises of the

- a) national chairman,
- b) two vice national chairmen,
- c) General secretary,
- d) deputy General secretary,
- e) 2 assistants General secretaries,
- f) national treasurer,
- g) assistant national treasurer,
- h) three trustees,
- i) And every branch secretary. This is the highest organ of the Union

12. There is also the national executive committee of the Union with the mandate to manage the affairs of the Union and has control over the individual officers of the Union. This committee is elected at the

meeting of the Central Council and consists of;

- a) all national officials of the Union ,
- b) three national trustees, and
- c) Six others members elected by the Central Council.

13. There is also the financial committee responsible for all Union funds. This committee reports to the executive committee and consists of;

- a) national chairman,
- b) 1st vice chairman,
- c) General Secretary and three national trustees

14. In the financial committee, the national chairman is the chairman of the committee while the Secretary to the financial committee is the national treasurer.

15. The entire national official is elected. Each national officer has a designation. Of concern here is the position of the General Secretary that is outlined under rule 15(d) that apart from being present at all meetings of the Central Council , executive committee and financial committee, this official is also the chief executive officer of the Union . The deputy General Secretary's role is also outlined at rule 15(e) put together with the two assistant General Secretaries to assist the General Secretary in the execution of his duties. It is stated thus;

*The deputy General Secretary and the two assistant General Secretaries shall assist the General Secretary in the execution of his duties. In the absence of the General Secretary, the deputy General Secretary shall exercise all the rights and powers of the General Secretary. The senior most assistant General Secretary shall act in the absence of the General Secretary and the deputy General secretary.*

16. There is therefore an order of things under rule 15(e) where the deputy General Secretary and the two assistant General Secretaries assist the General Secretary. The operative word here is 'and' to connote both the deputy and the two assistants assist or contribute to the work of the General Secretary. However where the General Secretary is *absent* the deputy General Secretary shall exercise all the rights and powers of the General Secretary. This rule does not stop at that, it goes on to add, the senior most assistant General Secretary shall act in the absence of the General Secretary General and the deputy General Secretary General.

17. Was this to follow cause or to add to the other? Why did the drafters of the Union Constitution stop at granting the deputy General Secretary the rights and powers of the General Secretary? I can only surmise there was a reason as to why the *most senior assistant General Secretary shall act in the absence of the General Secretary and the deputy General secretary*. Had these drafters and the delegates conference intended the roles to flow so as when the General Secretary is absent to have the deputy General Secretary act as such and when the deputy is absent for the most senior assistant Secretary General to act as such, this would have been the easiest thing for them to do. But they chose otherwise. I do not see any ambiguity. The Constitution is concrete. If there is any such ambiguity, the implications are for the Union to address.

18. However, the affairs of the Union shall not stop simply because the General Secretary is absent. There is the Central Council, the financial committee, the deputy General Secretary and the two assistant General Secretaries who are to run the Union even in the absence of the General Secretary.

19. Faced with any ambiguity, absence or conflict and or disputes ultimately rule 16 apply. The trustees

of the Union have the control of the funds of the Union and may delegate their power to any official of the Union.

20. It is not lost to the Court that even though the claimant's application is not prosecuted, the same was filed against the 1st Respondent and the Registrar of Trade Unions before the demise of the General Secretary. There exists therefore a suit and an application that is part and parcel of the matters before court. Article 15 of the Union Constitution cannot therefore be read outside other parts and must be seen in the whole. This cannot be done within the orders and application as filed by the 1st Respondent seeking to freeze the Union account and to have him listed as one of the account signatories. The absence of the General Secretary must however be addressed. I take note when the main suit was filed on 31st July 2014; the General Secretary was not absent.

21. The main suit raises weighty issues that should be addressed on priority basis. I will say that much in this regard.

**Noting the above outlined matters, these are the Court orders;**

- a) The interim orders herein made on 5th September 2014 to subsist for the next 30 days;**
- b) The 4th Claimant and by extension the officials and or officers of the 4th Claimant to immediately and not later than 7 days commence modalities for addressing the absence of the General Secretary;**
- c) Based on (a) above, where funds are required for purpose of meeting (b) above the same to be made available to facilitate the same;**
- d) Mention after 14 days for parties to record progress on (b) above;**
- e) After 30 days, the Court will give directions with regard to hearing of the main suit.**
- f) Costs will be in the cause.**

Delivered in open Court at Nairobi this 7th Day of October 2014

**M. Mbaru**

**JUDGE**

In the presence of;

Lilian Njenga: Court Assistant