



IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

Cause No. 100 of 2014

(Before Hon. Justice Hellen S. Wasilwa on 19th November, 2014)

Kennedy Makasembo CLAIMANT

-VERSUS-

Kenya Union of Post Primary

Education Teachers RESPONDENTS

RULING

The application before court is the one dated 15/5/2014. The applicant through the firm of Charles O. Onyango Advocate under certificate of urgency. The application was filed through a notice of motion dated the same day and brought under Order 40 rules 1 and 2 of the Civil Procedure Rules, S. 1A, 1B, 3A, 63(e) of the Civil Procedure Act and all other enabling provisions of law.

The applicant sought orders that:-

a) That this application be certified urgent and the same be allowed to be heard *ex parte* in the first instance.

b) That pending the hearing and determination of this suit, this honourable court be pleased to issue a conservatory order of temporary mandatory injunction directing the respondent to continue to recognize the claimant as the chairman of KUPPET Migori branch and to allow the claimant to carry out, unhindered, all his duties as such chairman.

c) That pending the hearing and determination of this suit, this honourable court be pleased to issue an order of injunction restraining the respondent, whether acting by itself, its national or branch officials, or any other person or entity, from organizing, supervising or conducting by-elections for KUPPET Migori branch, whether on the 25th day of May 2014 or on any other date, or at all.

d) That at the *ex-parte* hearing of this application, interim orders be granted in terms of prayers (b) and (c) pending the *inter partes* hearing hereof.

e) That the costs of this application be provided for.

The application was based on the following grounds:-

1. **The claimant is the chairman of KUPPET Migori County branch, which is a recognized branch of the respondent.**
 2. **The claimant's tenure as such chairman runs for the 5 years between 2011 and 2016, and is therefore current.**
 3. **There have been no proceedings in which the performance of the claimant as chairman has been discussed and consequently the claimant continues in that position to date.**
 4. **Despite this, the respondent has purported to recognize an alleged vote of no-confidence alleged to have been passed against the claimant as well as two other officials by allowing the coup plotters to run branch affairs.**
 5. **In purported recognition of the illegal activities that have taken place in the branch, the respondent has now purported to allow for a by-election set to be conducted on 25th May 2014 ostensibly to fill "vacant" posts in the branch.**
 6. **The procedure adopted for the alleged vote of no-confidence is illegal, the appointment of the caretaker committee is likewise tainted with illegality and the by-elections are an outright travesty of the rule of law and common decency.**
 7. **There is a strong *prima facie* case established that warrants the grant of the orders sought by this application.**
 8. **Irreparable loss shall be occasioned to the claimant if the respondent is allowed to proceed along the trajectory of illegality that it has commenced.**
 9. **This is a fit and proper case for the grant of the orders sought.**
- 10. It is in the interest of justice that the orders sought are granted.**

The application was also supported by the supporting affidavit of Kennedy Makasembo the applicant herein.

In the interim, orders were granted in terms of prayers (a), (d) and Hilda B. Ghati the respondent's Deputy Executive Secretary Migori County and the respondent's National General Secretary – Akelo M. T. Misori were to be personally responsible for the compliance with the said orders. Vide an application before this court on 9.6.2014, other parties were enjoined as respondents being Angela Odero, Hilda Ghati, Henry Otunga and Lucas Odunga Nyamusi.

This application is opposed by the affidavit of Akelo M. T. Misori filed on 22.5.2014 and his further affidavit filed on 9.6.2014. There is also an affidavit of Angela Odero filed in court on 25.6.2014.

The applicant filed a supporting affidavit on 2.7.2014 and another further replying affidavit. The applicant contends that he is the *bona fide* elected chairman of KUPPET Migori branch having been elected in 2011 for a tenure of 5 years. This is as per **App-1** which shows that elections were held on 26.2.2011. The applicant contends that he has served faithfully but in February 2014, he came across an unsigned notice (**Annex KM-2**) purporting to call for a Branch Governing Council (BGC) meeting to be held on 23.2.2014. As chairman, he was not aware of any such meeting. None of the branch officials owned up to calling for such a meeting. He then directed the branch County Executive Secretary to write to members of the branch to ignore the notice of 23.2.2014. It is therefore the applicant's contention that no meeting took place on 23.2.2014 and he does not know of people who attended the meeting.

On 24.3.2014, the applicant came across **App KM-4** – signed by the Secretary General of KUPPET asking them to introduce new officials of the branch to the bank (**App KM-4**). The applicant contends that he has not been subjected to any disciplinary proceedings and his performance has not been discussed in any forum. It is therefore surprising that a disciplinary process is being alleged which he didn't know. The minutes alleging that new officials sat and decided to change signatories to branch account including the branch Benevolent Account are strange to him (**App KM-5(a)**). He also avers that the list of members who attended the meeting **App-6** is not a true reflection as he reached out to some of the teachers he knew and several of them told him that they didn't attend the meeting. The applicant has in **Annex 6** put an asterix (*) against the names of the teachers who didn't attend and their inclusion on the list is fraudulent.

The applicant further contends that a special General Meeting of a branch does not have powers to

remove a chairman even if such is held. He contends that the branch secretariat must sit and level accusations against an official sought to be indicted. After hearing the officials after proper notice, they proceed to indicate that there is merit in accusations and then pass their findings to the Branch Governing Council (BGC). If the Branch General Congress agrees that the branch executive arrived at proper position, the resolution is sent to the Secretary General of KUPPET in Nairobi within 14 days. The Secretary General then takes it to the National Council for endorsement. It is then that the official is deemed to be removed. This, the applicant says is provided for in KUPPET Constitution at Article 5(i).

The applicant contends that in his case this procedure was never followed and what was seemingly adopted by respondents i. e vote of no-confidence is unknown to the Constitution of KUPPET. The applicant also submitted to court that Article 9 deals with by-elections and reasons for such by-elections and contends that even if a meeting was held by the secretariat, the resolution would not have removed him.

He wants court to find that he is still a *bona fide* official of KUPPET Migrori branch. He further avers that KUPPET Migori branch has 774 members as per list provided (**App 6**) and therefore the purported meeting had no quorum as provided for under Article 4 which provides that there must be a 2/3rds majority of the members to remove an official.

The applicant contends that he is being removed for having sued the head office vide Case No. 14 of 2014 (**App 17**). This, he says is evidenced by a letter written by KUPPET National Office in November 2013 dated 28.11.2013 (**Annex KM-8**) complaining of certain misgivings which in February 2014 are now being perpetrated by the same office.

In relation to 2nd to 5th respondents, the applicant contends that they are busy bodies and their only claim to being in court is that they wanted to vie for the so called vacant election of 25.5.2014 which were stopped by court. The applicant contends that he was never notified of any meeting vide a letter dated 23.1.2014 meant to discuss his conduct. He stated that such a letter is a fabrication and was never served on him and he never signed for it. In answer to 1st respondent's Annex 1 a list of members present during the meeting of 23.2.2014 with 308 members, the applicant contends that on 22.5.2014 when the parties appeared before **J. Ongaya**, the list of members given was not yet signed. However in an affidavit of 25.6.2014 of Angela Odera a new list of members now hand written is presented. The applicant contends that this list is cooked up as the similarity of handwriting on the list raises eye brows. Further in his para 9 of supplementary affidavit, the applicant has attached **Annex KM-9** a bundle of affidavits sworn by several people stating that they neither attended the meeting or signed the list and that this is an indication that the list is fabricated.

In regard to allegations levelled against him for mismanaging of funds, the applicant avers that this is an imagination as a proper audit must be produced to prove it. The applicant alleges that regardless of all accusations against him, there was no fair administrative action. He was not given any notice and a hearing. He states that he was appointed for 5 years and he wants this court to allow him carry on with his term.

The respondents opposed this application through the firm of Nchoe, Jaoko and Co. Advocates. In answer to submissions by the applicant, the respondents aver that prayer (c) is overtaken by events. Concerning the Branch Governing Council (BGC), the respondents aver that there is no such body. On **App KM-2**, they contend that it is generated by the applicant himself. Concerning the list of attendees, the respondents pointed out that it is not fabricated. They referred court to the further affidavit of Angela Odera sworn on 23.7.2014 and filed in court on 25.7.2014 – **Exh AN 1** – pg 8 to 15, the court proceedings in which the respondent's counsel stated that he was never asked about a signed list and he admitted to it.

On allegations that Secretary General meeting cannot remove a chairman, the respondents referred court to the affidavit of 1st respondent filed in court on 9.6.2014 at pg 36 – where he referred to Article 8.10(iii) and he states that it is under this Article that respondents began the disciplinary action at the branch. They also referred court to Article 5(**Exh AM5**) at pg 34 which they say is the relevant Constitution stamped by relevant officers and does not talk of Branch Governing Council. On issue of vote of no-

confidence, they submitted that there is no provision under Article 9 which indicate how notice of meetings shall be issued. On Article 8.8(h), they submitted that it provides the branch with powers to replace an official and does not state the quorum of the meeting. They submitted that Article 4 of Constitution of KUPPET does not provide for 2/3rds provision as submitted by the applicant.

They further submitted that 2nd to 5th respondents are not busy bodies and that the order stopping elections was issued on 22.5.2014 by court when already elections were scheduled to take place. Relevant disciplinary procedures had taken place and applicant ousted. There was no vacancy and affairs of branch had to go on as usual by way of elections. They submitted that the list is not cooked up. They also submitted that applicant was removed by virtue of misuse of funds as per *Exh AM-2* and that an audit report was not necessary.

The applicant denies misusing of funds. On the Branch General Conference referred to, the applicant state that this is reference to general council used in Constitution interchangeably. On Constitution, reference is to the operative Constitution stamped by Migori branch and not signed, the operative Constitution being of 2010.

Having heard both parties and upon considering their written affidavits and entire pleadings, the issues for determination are as follows:-

1. **Whether a general meeting was held on 23.2.2014 or any other day ousting the applicant.**
2. **Whether the list of attendees as submitted for the meeting is authentic.**
3. **What is the procedure of removing a branch executive.**
4. **Whether the procedure was followed in the case of the applicant.**
5. **What orders can be granted by this court.**

On 1st issue, *Appx KM-1* shows that the applicant was elected as chairman of KUPPET Migori branch on 26.2.2011. However *Exh AN-1* attached to the supporting affidavit of Angela Odera dated 22nd May 2014 is a letter addressed to the applicant reminding him to appear before a Branch Governing Council meeting on 25.11.2013. It is signed by Hilda B. Ghati the Ag. Executive Secretary. As to when Hilda B. Ghati became the Ag. Executive Secretary is not clear because on *App KM1* – She is listed as Asst. Secretary. As to whether this letter was received by applicant or not is also not clear.

Next is a notice of a General Assembly of the branch scheduled for 23.2.2014 which applicant states he was not aware of as branch chairman and he wrote a letter disclaiming the said meeting on 18.2.2014 (*App KM3*). However Ex AN 1 minutes of KUPPET Migori branch Special General Assembly held on 23.2.2014 at 12 noon filed by respondent show a meeting was held whereby 308 people attended including the applicant.

On this the applicant has contended that people on the list whose names have an asterix(*) did not attend and some including Otieno Zablon (No 276), Paul Assam Okongo (No 247), Okayo Philip Otieno (No 150), Dima George Ochieng (No 260), Onyango Fredrick Mbogo (No 279) and Oyugi Paul (No 92) have deponed that they never attended the meeting of 23.2.2014 and they also deny signing the list of attendees. This is as per *App 9* on the applicants supplementary affidavit dated 2.7.2014.

The respondents however have also annexed 14 affidavits sworn by 14 members (*Annx 3*) on respondents further affidavit deponing that they attended the meeting. What then plays out is that whereas some people may have attended such a meeting, others categorically state that they never attended. The onus thus falls on respondents to prove that the people they allege attended did indeed attend and sign on attendees list. Without such proof then it turns out that the list of attendees who attended and the minutes of the alleged meeting is a fabrication.

App Exh AOM 1 attached to the replying affidavit of Angela Odera filed on 25.6.2014 is further of interest being a list of attendees but now handwritten in similar handwritings. What stands out is that if it was intended to be handwritten then the attendees should have written their names and signed against them also indicating their identity card numbers. As it stands the list is suspect and as submitted by the

applicant, a fabrication and does not reflect what transpired on 23.2.2014 if any.

What is the procedure for removing a branch executive? The applicant referred court to Article 5(1) of the KUPPET Constitution which was not annexed. However the respondent annexed a Constitution of KUPPET stamped received in 2012 *App AM-5*. Under Article 89 of this Constitution, the Branch Governing Council (BGC) is established. One of the duties of the Branch Governing Council (BGC) as provided under Article 8.10(iii) is to:-

“Initiate the process of disciplining of any member and forward the same to the Secretary General any decision they arrive at that meeting within seven (7) days.”

Article 21 deals with discipline of the officials. Under the said Article:-

“A member or official may be suspended or expelled from the union as may be determined by the National Governing Council by 2/3 majority vote.”

The issue of the branch discipline is not provided for in the Constitution.

Article 13(2) deals with by-elections and states that there would be by-election in event of resignation/removal etc of any union official which shall be filled by the branch delegates conference. The process of removal is also not explained.

With the loop holes pertaining in the KUPPET Constitution, the fall back position is the general law of the land. In determining whether proper procedures were followed in “removing” the applicant. There is no indication that he was given notice of his misdeeds. There is also no proof that he was given a hearing by the branch executive because he denied even receiving *Exh 1* summoning him to the Branch General Council (BGC). Minutes of the envisaged meeting of 2.12.2013 were also not provided. This defeats the provision of Article 41 of the Constitution which provides for fair labour practices. This also offends the provision of Article 47 of the Constitution demanding fair administrative action. Article 47 of the Constitution of Kenya 2010 provide that:-

“(1) Every person has the right to administrative action that is

expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration.”

There is no proof of any fair administrative action meted on the applicant as envisaged above and given that this court has already stated the minutes of the General Assembly which purported to oust the applicant are a fabrication, it follows that any action taken against the applicant purporting to oust him is null and void.

I therefore make the following orders:-

- 1. That pending the hearing and determination of this suit, the respondents herein shall continue to recognize the claimant as chairman of KUPPET Migori branch and allow him to carry out unhindered all his duties as chairman.**

2. **Pending hearing and determination of this suit, the respondents, whether by themselves or by their agents or any other person acting on their behalf are restrained from conducting by-election of KUPPET Migori branch unless there is a valid reason to do so following due process or until the applicant serves his term of 5 years whichever is earlier.**
3. **Costs of the application to the applicant.**

HELLEN S. WASILWA

JUDGE

19/11/2014

Appearances:-

Ouma h/b Onyango for claimant/applicant present

Jaoko for respondents present

CC. Wamache