



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT KISUMU
CAUSE NO. 119 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 12th November, 2014)

WINFRED OKINDACLAIMANT

-VERSUS-

KENYA NATIONAL UNION OF TEACHERS

BUNGOMA EAST BRANCH & 12 OTHER..... RESPONDENTS

RULING

The application before court is the one dated 3.6.2014. The application was filed under certificate of urgency by the claimant applicant and was filed through a notice of motion filed and brought under S.12(3) of the Industrial Court Act, Rule 16 of the Industrial Court (Procedure) Rules 2010 and any other enabling provisions of law. The applicant initially came *ex parte* seeking the following orders:-

1. **The instant application be certified urgent and service of this application be dispensed with in the first instance.**
2. **That pending the *inter partes* hearing and determination of the instant application the respondents, their agents or any other person acting on their behalf or instructions be temporarily restrained from proceeding to table the suspension and allegations levelled against the claimant in a letter dated 13th May, 2014 and the minutes of the 2nd respondent dated 13.5.2014 for discussion in the Bungoma East Branch of the Kenya National Union of Teachers Annual General Meeting to be held on 6.6.2014 or any other date.**
3. **That pending the *inter partes* hearing and determination of the instant application the respondents, their agents or any other person acting on their behalf or instructions be temporarily restrained from enforcing the resolutions made on 13.5.2014 suspending the claimant from her position as the treasurer of the Bungoma East Branch of the Kenya National Union of Teachers.**
4. **That pending the hearing and determination of the instant claim the respondents, their agents or any other person acting on their behalf or instructions be temporarily restrained from proceeding to table the suspension and allegations levelled against the claimant in a**

letter dated 13th May, 2014 and the minutes of the 2nd respondent dated 13.5.2014 for discussion in the Bungoma East Branch of the Kenya National Union of Teachers Annual General Meeting.

5. That pending the hearing and determination of the instant claim the respondents, their agents or any other person acting on their behalf be temporarily restrained from enforcing the resolutions made on 13.5.2014 suspending the claimant from her position as the treasurer of the Bungoma East Branch of the Kenya National Union of Teachers.
6. That costs be provided for.

He was granted *ex parte* orders in terms of prayer 1 and 2. The matter was then listed for hearing *inter partes* and the claimant now seeks the remainder of the prayers above.

The application is based on the following grounds:-

1. The claimant is both a member of the 1st respondent and the 2nd respondent and was duly elected by teachers to the position of the treasurer to the Bungoma East Branch of the 1st respondent and is also an employee of the Teachers Service Commission deployed as a head teacher Misikhu R. C. Primary School within Bungoma County.
2. The 1st respondent has its own Constitution that guides all its operations and the operations of its branches including the 2nd respondent and among them it provides for the procedures for suspension of any member or an official from acting as an official of the union or as a member or removal of an official from office.
3. On the 13th day of May 2014 the 3rd to the 13th respondents convened a meeting on behalf of the 2nd respondent with a view of commencing proceeding for removal of the claimant from office with result that they purported to suspend the claimant from her office as the treasurer to the 2nd respondent and they now intent to subject the claimant's alleged conduct for discussion in an annual general meeting for members of the 2nd respondent to vote for her removal from office or reinstatement as a treasurer.
4. The claimant avers that the process meant to remove her from office has been unlawfully commenced since she was not given fair hearing when the Bungoma East Branch of the Kenya National Union of Teachers Branch Executive Committee resorted to discuss her conduct as the treasurer.
5. The claimant was not given prior notice of the allegations levelled against her and she got to learn of them in the meeting and the Branch Executive Committee members could not give her a proper opportunity even to express her views in light of the allegations which had been levelled against her.
6. The meeting held on the 13th day of May, 2014 is a nullity as it contravened the provisions of the Constitution of the Kenya National Union of Teachers, other laws and the rules of natural justice.
7. The claimant states that the Branch Executive Committee of the 2nd respondent relied on a anonymous correspondents whose source could not be established to arrive at a decision to suspend her.
8. The respondents have now proceeded to call for an annual general meeting of the 2nd defendant to be held on 6.6.2014 of which one of the agenda is present allegations levelled against the applicant for discussion by the said meeting and voting to be done on whether the applicant should be removed from office.
9. That the claimant applicant's case is most likely to be rendered nugatory and the claimant will suffer irreparable damages if the orders sought herein are not granted on priority basis.

The application is further supported by the affidavit of Winfred Okinda the applicant herein deponed on 2nd June 2014.

The applicant's contention is that the process commenced to remove her from office is unlawful as she was not given a fair hearing nor notice of allegations levelled against her. The applicant contends that on 13.5.2014, the 3rd to 13th respondents acting in their capacities as Branch Executive Committee members of 2nd respondent convened a meeting to discuss her conduct contrary to provisions of KNUT

Constitution and purported to pass a resolution suspending her from performing her duties as branch treasurer. The applicant annexed copies of the suspension letter, minutes and correspondences relied on marked **WO-1, 2, 3 & 4** respectively. She contends that the respondents intent to subject her to the AGM for members to discuss and remove her from office is a process which has been unlawfully commenced and against the provisions of the Constitution of KNUT. She annexed the KNUT's Constitution as **App W.O-6**.

The applicant also avers that when the 3rd to 13th respondents convened the meeting which led to her suspension, she was not given prior notice of allegations levelled against her and was not accorded a fair opportunity to express herself against the allegations they levelled against her. This she contends can be demonstrated from the minutes of the meeting of 13.5.2014.

The applicant contends that the respondents have acted contrary to the rules of natural justice and in contravention to the Constitution of KNUT and that there was no vote by the Branch Executive Committee as provided by Article **X(D)(5)** of the said Constitution. She avers that the Branch Executive Committee of 2nd respondent relied on anonymous correspondences whose source could not be established to arrive at a decision to suspend her and the same are already marked **W.O-3** and **4**.

The applicant further alleges that the allegations in the minutes of 13.5.2014 are false and the minutes themselves are a fabrication meant to victimize her with the object of removing her from her position as treasurer and that the 3rd respondent has purported to confirm the minutes of a meeting he never chaired as his name on the attendance sheet (**Annex W.O-7**) shows that he sent an apology.

The applicant also contends that she attended the meeting of 13.5.2014 but was unwell and collapsed while in the same meeting and had to be taken for treatment as per **App W.O-8**. She was finally suspended on 29.5.2014 based on the meeting of the 3rd to 13th respondents sitting on behalf of 2nd respondent on 13.5.2014. The applicant avers that the 2nd to 13th respondents have acted maliciously and in bad faith with the sole objective of damaging her reputation before members of 1st and 2nd respondents who voted her as treasurer and have purported to elevate the 10th respondent to take up her position as an acting treasurer.

The respondents have opposed this application. The 2nd to 13th respondents filed their joint response through the firm of Onyando & Co. Advocates. The 1st respondent on the other hand filed memo of appearance only on 3.10.2014 through the firm of Singoei Murkomen & Sigei Advocates.

2nd to 13th respondents opposed the application and orders sought by the applicant. It is their position that the application is frivolous, incompetent and an abuse of the court process. They relied on a replying affidavit sworn by the 4th respondent Aggrey Namisi sworn on 10th June 2014. 4th respondent is the Executive Secretary of the 2nd respondent and he further swore this affidavit on his behalf and also on behalf of the 3rd, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th and 13th respondents who he stated he had authority to swear the same on their behalf. He further filed a further affidavit on 8th July 2014 sworn on 5th July 2014. He avers that the supporting affidavit, notice of motion and statement of claim are not only misleading but full of falsehood. He contends that powers to suspend an officer are legally outlined and mandated under Article **X(C)4** of the KNUT Constitution and Rules and Regulations as revised on 8th December 2010. He contends that the applicant rushed to court prematurely before the decision could be reached by members at the AGM and this was speculative and intended to pre-empt the decision of AGM. He further avers that the extra ordinary special meeting was invoked and initiated by the demand of the members as per the Annex **AMN – 1**.

On 6th June 2014 he denies that the applicant collapsed at the meeting and that the allegation of sickness is an afterthought. His further contention is that the removal of any member or suspension lies with the AGM and if any member is dissatisfied, then an appeal can be sought to the National Executive Council of the union for consideration. He denies that the respondents acted contrary to the law and rules of natural justice and that all members of Branch Executive Committee passed a resolution to suspend the applicant as evidenced in the annexures **W.O-1 & W.O-2**.

It is their contention that the applicant was properly given a hearing having attended the meeting and even signed the attendance register. They aver that the suspension was legal and as per the Constitution.

Having heard the parties herein, the issues for consideration are:-

1. **Whether the decision taken by the respondents against the applicant was as per the KNUT Constitution and following rules of natural justice.**
2. **Whether the orders sought by applicant can be granted.**

On the 1st issue, the guiding law is the KNUT Constitution and the Constitution of Kenya 2010.

Article X of the KNUT Constitution establishes the Branches of the union. Under Article X(c), the Branch Executive Committee is established with its duties being listed under Article X(c)(3). Under Article X(c)(3)(1), the

“Branch Executive Council may suspend any of its officers for negligence of duty, dishonesty, incompetency or failure to obey decision or for other reasons it may deem fit and important in the interest of the branch and recommend such suspension to the branch general meeting for a decision to either reinstate or dismiss. However any officer of the union dismissed by the branch general meeting who is dissatisfied with the decision of his/her dismissal can appeal to the National Executive Council of the union for consideration ---”

Under Article X(D)(5):-

“Any branch officer of the union may be suspended from his/her office by a two thirds majority decision for all members entitled to attend and vote and the Branch Executive Committee ---”

The applicant has contended that there was no voting at the Branch Executive Committee meeting to suspend him. The minutes of the meeting held on 13.5.2014 to suspend the applicant are annexed to aid the court in deciding whether there was a vote or not. They are signed and confirmed by David Wakhungu as chairman who unfortunately was not present during the meeting having sent an apology as per the attendance sheet **App. 6**. The aspect of the chairman's absence are also confirmed by the Annex – dated 13.5.2014 annexed to 4th respondent's replying affidavit where David Wakhungu had written to the Executive stating that he was unwell and could not attend the meeting. He requested that one Mr. Eliud Wamalwa chairs the meeting for him. The minutes now signed by the absent chairman David Wakhungu cannot therefore represent the true position of what transpired on 13.5.2014. Further to this is the assertion by the applicant that she was unwell on this day and she annexed her hospital treatment notes as proof of this. The respondents avers that these are all falsehood but they did not produce any evidence to prove the falsehood in the hospital notes.

The applicant had also contended that she was not given prior notice to the allegations levelled against her. The respondents have not indicated by any evidence that they gave the applicant notice of any allegations levelled against her. This contravenes her rights as provided in the rules of natural justice and Article 50(1) of the Constitution which states that:-

“50(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body”.

Given that there is no proof of a fair hearing given to the applicant and given that there is no authenticated minutes of 13.5.2014 which made a decision to suspend the applicant, the entire process which suspended the applicant is faulty and the decision is therefore a nullity.

What orders then can the applicant be granted? I therefore grant the applicant the orders in terms of prayers 4 and 5 as follows:-

1. That pending the hearing and determination of the instant claim the respondents, their agents or any other person acting on their behalf or instructions be temporarily restrained from proceeding to table the suspension and allegations levelled against the claimant in a letter dated 13th May, 2014 and the minutes of the 2nd respondent dated 13.5.2014 for discussion in the Bungoma East Branch of the Kenya National Union of Teachers Annual General Meeting.
2. That pending the hearing and determination of the instant claim the respondents, their agents or any other person acting on their behalf be temporarily restrained from enforcing the resolutions made on 13.5.2014 suspending the claimant from her position as the treasurer of the Bungoma East Branch of the Kenya National Union of Teachers.

These orders will remain in force until the final determination of this claim.

HELLEN S. WASILWA

JUDGE

12/11/2014

Appearances:-

Applicant absent

4th & 5th respondents present

CC. Wamache