



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 1471 & 1986 of 2011**

**JAMES O. TONGI & 10 OTHERS.....**  
**CLAIMANTS**

**VS**

**ROBERT ODWORI ABWOGA & 2 OTHERS.....**  
**RESPONDENTS**

Mr. James Onkoba for the Claimants

Mr. Abwoga for Respondent

**RULING**

The Notice of Motion dated 30<sup>th</sup> August, 2011 was brought on a Certificate of Urgency seeking for orders:-

1. This application be certified as urgent the service be dispensed with and the application be heard ex-parte in the first instance.
2. The operationalisation of the current Extract regarding changes of officials of KENYA SHIPPING, CLEARING & WAREHOUSES WORKERS' UNION made by the Registrar of Trade Unions between 15/5/2011 and 23/8/2011 be stayed and the officials listed in the Extract issued on 23/8/2011 be restrained from holding office and acting as officials of the said Union pending the hearing and determination of this application and/or Claim.
3. The status of the National officials of Kenya Shipping, Clearing & Warehouses Workers' Union prior to the changes made between 15/5/2011 and 23/8/2011 by the Registrar of Trade Unions be reverted to and be maintained pending the hearing and determination of this application and/or quashed.
4. A declaration that the purported National Elections of the Union held between 15/5/2011 and 23/8/2011 were Sham Elections, unlawful and against the Union's Constitution and thus *null and void ab initio* and the same be nullified and/or quashed.

The Application was based on the following grounds:-

- (i) The Registrar of Trade Unions, the 3<sup>rd</sup> Respondent herein called for Union elections on 10/12/2010.
- (ii) The Union has had cases pending in Court regarding 3 of its branches that is Changamwe

Branch, Nairobi Branch and Embakasi Branch as Industrial Cause Nos. 256/2011 and 466/2011 and both were pending in Court by 30/5/2011 but even before the said branch elections could be determined and the branch officials registered, the General Secretary of the Union allegedly issued a purported Notice for and or convened the National elections of the Union though the National Executive Committee (NEC) of the Union has not met and/or did not meet validly and sanctioned any Annual Conference (AC).

(iii) No notice for the AC was properly issued and no AC was properly convened as required by rule 5 of the union's constitution.

(iv) An objection against any unlawful changes in the register of officials of the union was lodged with the Registrar of trade unions on 26/5/2011.

(v) A form Q may have been presented to the Registrar for registration and the Registrar may have registered the said form Q between 15/5/2011 and 23/8/2011, without proper enquiries, and without reference to the objectors hence unlawful.

Furthermore, the said application is grounded on the Supporting Affidavit of Michael Owino in his capacity as the Assistant General Secretary of the 2<sup>nd</sup> Respondent.

No Interim orders were granted and the Application was heard by Justice Paul Kosgei on 6<sup>th</sup> December, 2011. He reserved a ruling on the matter but he did not deliver the same until he ceased to be a judge.

Matter was mentioned before me on 19<sup>th</sup> November, 2012 when the Applicants were represented by Mr. Michael Owino who introduced himself as Assistant General Secretary and the General Secretary of the 2<sup>nd</sup> Respondent appeared in person. The 3<sup>rd</sup> Respondent (Registrar of Trade Unions) was not represented.

By consent of the parties the matter was consolidated with Cause No.1986 of 2011 and a ruling was reserved on the matter.

In Cause No.1986 of 2011 the parties were seeking an injunction restraining the Registrar of Trade Unions from causing change in the Register of officials of the Kenya Shipping, Clearing and Warehouses Workers' Union pending the hearing and determination of the application and stay the operationalisation of the extract issued by the Registrar of Trade Unions on 29<sup>th</sup> August, 2011 regarding changes of officials of the Union and the said officials be restrained from holding office or putting themselves as such officials and or discharging any functions as officials of the Union.

That the status of the National Officials of the Union prior to the change made between 15/5/2011 and 23/8/2011 be reverted to and maintained as per the extract issued on 15/2/2010 pending the hearing and determination of this application and claim.

From the outset, as was observed by my sister judge Hon. Lady Justice Wasilwa in her ruling dated 22<sup>nd</sup> October, 2012 in Cause No.1986 of 2011, that there is duplicity of cases filed by the same parties and on similar subject matter in Cause No.1471/2011; 1438/2011 and 1986/2011. All these disputes concern this union. This state of affairs is undesirable in that, it is not only an abuse of the process of this court but it demonstrates non-commitment by the officials in dealing with the primary objectives of the union as mandated by the Constitution, being the welfare of members who sustain the said union through their hard earned subscriptions. This is a regrettable state of affairs which should change sooner than later.

The facts leading to the cause of action in these two matters maybe summarized as follows:-

The Union held National Elections on or between 15/5/2011 and 23/8/2011 which the Applicants in Cause No.1471 and 1986 of 2011 allege were held contrary to the law and union's Constitution

because they were not sanctioned by the National Executive Committee (NEC) and some branches of the union namely:- Embakasi and Changamwe had not done their elections. Four other branches had successfully concluded their elections. That on and or between 15/5/2011 and 23/8/2011 the Registrar of Trade Unions registered the elected persons as the officials of the Union and they had since continued to conduct the official functions of the Union.

That part of the eleven Claimants/Applicants were registered as National Officials accordingly.

That wrangles ensued pursuant to the controversial elections and a conciliation meeting under the auspices of the Umbrella Federation, COTU took place on 15/5/2011, pursuant to which certain compromise changes were made including elevation of Mr. Nelson O. Othoo from NEC Member to Assistant General Secretary while Jane N. Mbuvi was elevated from the position of 3<sup>rd</sup> National Trustee to that of Assistant National Treasurer.

That this conciliation meeting was initiated by the Claimants/Applicants and they cannot now be heard to fault the process. These positions were subsequently gazetted by the Registrar of Trade Unions via Gazette Notice dated 30<sup>th</sup> May, 2011 attached to the Respondent's Memorandum of Reply. The Memorandum of Agreement dated 15/5/2011 is attached as Appendix 'ROA2' to the Memorandum of Reply and the full list of agreed officials is Appendix 'A' to the Memorandum of Understanding drawn at COTU (K) Hqs. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Claimants in Cause No.1471 of 2011 and 1<sup>st</sup> and 2<sup>nd</sup> Claimants in Cause No.1986 of 2011 were signatories to the Conciliation agreement.

Section 30 of the Labour Relations Act, No.14 of 2007 provides:-

*“Any person aggrieved by a decision of the Registrar made under this Act may appeal to the Industrial Court against that decision within thirty days of the decision”.*

The Claimants/Applicants participated in a conciliation effort which resulted in amicable solution signed by not less than four (4) of the Applicants.

As I stated in the Industrial Court cause No. 1362 of 2011 Kenya Plantation and Agricultural Workers Union –v- Maji Mazuri Flowers Ltd at pg.6 *“The enforceability of conciliation outcomes is an important feature of dispute resolution. This is intrinsically linked to the principle of self determination in that where the parties conclude a written agreement signed by all parties and the conciliator, this is clearly intended to be a binding contract between the parties and therefore enforceable. Such an agreement ordinarily is presented before court and is made an order of the court”.*

The Notice of motion on a certificate of urgency in Cause No. 1471 of 2011 is dated 30<sup>th</sup> August, 2011 and was filed on 1<sup>st</sup> September, 2011. It seeks *inter alia* to annul registration of persons unlawfully registered as officials of the union between 15/5/2011 and 23/8/2011.

Clearly the officials were registered on 30<sup>th</sup> May, 2011 and the Applicants did not approach court until the 1<sup>st</sup> September 2011, four months thereafter.

Furthermore the Notice of Motion filed is clearly not an Appeal against the Registrar of Trade Unions. No attempt has been made by the Claimants/Applicants to seek condonation for filing the matter past the limitation period.

In the present matter the Memorandum of Agreement was presented to the Registrar of Trade Unions who proceeded to enforce it by registering the officials as agreed upon as the duly elected officers of the union.

The Claimant/Applicant is estopped from reneging from that covenant especially many months down the line when the agreement has been enforced and the officials taken up their offices to serve the Union.

The prayer to nullify the registered officials is refused accordingly.

Having said that the Court recognized the need for the union officials to live by the letter and spirit of the Constitution of the Union to avoid constant internal wrangling.

It is imperative therefore that National Union Elections be held so as to appease all the parties in this matter in strict conformity with the Union Constitution.

In this regard the (NEC) should meet within 30 days to determine the date and place of holding National Elections of the Union in any event, the same be held within three (3) months from the date of this Ruling.

No orders as to costs.

**It is so ordered.**

**DATED and DELIVERED** at Nairobi this 10<sup>th</sup> day of April, 2013.

Mathews N. Nduma

**PRINCIPAL JUDGE**