



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause of

JOHN SIMIYU 1ST APPLICANT

PETER LOLMODOONI AND 9 OTHERS 2ND APPLICANT

VERUS

JOANES OKOTCH 1ST RESPONDENT

KENYA HOTELS AND ALLIED WORKERS UNION.....2ND RESPONDENT

THE MINISTER FOR LABOUR AND

HUMAN RESOURCE DEVELOPMENT 3RD RESPONDENT

REGISTRAR OF TRADE UNION 4TH RESPONDENT

RULING

This is a ruling relating to preliminary objections raised by the 3rd and 4th respondent dated 3rd April 2013 and that of the 1st and 2nd respondent dated 30th May 2011. The 3rd and 4th respondent objections relate to the applicants Notice of Motion dated 7th February 2013 on the ground that;

1. The same is incompetent, vexatious, defective and bad in law and should be struck out for failure to comply with rule 16(5) of the Industrial Court (procedure) Rules;
2. That the affidavit of John Simiyu sworn on 7th February 2013 in support of the Notice of Motion should be struck out as it offends mandatory provisions of the law; and
3. The orders granted in the application cannot be granted at an interlocutory stage of the civil proceedings.

The 1st and 2nd respondents on the other have raised objection dated 18th April 2013 on the grounds that;

1. When this matter came for hearing the court was not sitting
2. That instead of taking hearing dates and 1st applicant has filed a new application dated 7th February 2012
3. That this application offends rule 16(5) of the Industrial Court (Procedure) Rules
4. That the application is by the 1st applicant alone and not authorized by the other applicants

5. That 2nd respondent elections were conducted and registered on 10th December 2010 pursuant to section 34 and 35 of the Labor Relations Act
6. That prayer 3 on the Notice of Motion offend Article 41 (2)(c) of the Constitution as the court does not impose leaders on a union and its members
7. That there are 9 undisclosed claimants and should be expunged
8. That 3rd respondent ceased to exist on 9th April 2013 as under section 2(1) of the Industrial Court Act
9. That the application is defective and an abuse of the court process and should be struck out.

These two parts and the objections therein by the respondents will be consolidated and addressed jointly. And note that the Applicants made a reply to the objections raised and noted that the preliminary objections raised by respondents contravene Rule 24(5) of the Industrial Court (Procedure) Rules and Article 159(2) of the Constitution noting that what the respondents did on 19th February 2011 by purporting to hold elections defeats the intentions and meaning of section 34 and 35 of the Labor Relations Act.

I note the basis of this claim is the one filed and dated 5th September 2011 seeking for orders that the elections of 19th February 2011 effected on 22nd February 2011 by the 4th respondent be deemed defective, null and void and that the 1st respondents be compelled to call for proper elections in accordance with the 2nd respondent's constitution. This follows what the applicants call 'purported elections' done by the 2nd respondent union on 19th February 2011 to elect national officials and executive committee members at Mombasa where almost all the incumbent were retained except for the 1st applicant, John Simiyu and five others. That returns were made and changes effected on 22nd February 2011.

With this background the applicants came to court under certificate of urgency on 6th April 2011 seeking that status quo be maintained as of 22nd February 2011 until the issues herein are determined. Leave was also sought from the court that should the matter not be heard and determined before 30th June 2011 following a notification issued by the 4th respondent on the completion of elections of the 2nd respondent, that those national elections be held thereafter.

On 19th April 2011, this application was refused and parties directed to take hearing dates.

The applicants have now come to court with application dated 7th February 2013 under Certificate of Urgency seeking for orders as against the 3rd and 4th respondents to maintain the status quo as prayed on 18th February 2011 on the grounds that since the 3rd and 4th respondents were served they have failed to make any objections and that they have failed to indicate when the elections were held and the changes entered and further that the 1st respondent has failed to file the extract detailing his return to the offices.

This application is supported by the Affidavit of John Simiyu the 1st applicant. That he has served all the respondents with the claim herein on 26th April 2011 but they have ignored to respond and being aware of the prayer for status quo to be maintained which they have failed to do.

As noted above the basis of the preliminary objections herein as consolidated relate to the two Notice of Motion filed in this case one dated **7th February 2013** and the initial Motion dated **6th April 2011**. The main prayer sought under the earlier application is that;

2. that the applicant prays that the honourable court be pleased to order for the status quo before changes effected by the 4th respondent on 22nd February 2011 be maintained until this matter is heard and determined.

3. Leave be granted by this honourable court that should this matter not be heard and determined before the 30th June 2011 pursuant to the notification by the 4th respondent dated 10th December 2010

as to the completion of the election exercise, the national election for the 2nd respondent be held thereafter.

This same prayer is replicated in the main claim of the applicants.

In the application before Court dated 7th February 2013, prayer sought is;

2. *That this honourable court is pleased enough to grant orders No. 2 of the Notice of Motion sought against the 3rd and 4th respondent as was prayed.*

3. *That this honourable court is pleased enough to order the 4th respondent to maintain the status quo as prayed on 18th February 2011.*

On 19th April 2011 the court declined the application dated 6th April 2011. Parties were directed to take hearing dates for the main suit. No appeal against that decision is pending. No review of that decision was done. I take it then there are no subsisting orders requiring for status quo to be maintained or directed at the 3rd and 4th respondents stopping them from doing anything as regards this matter. Equally, the claim as against the respondents jointly or individually is still pending awaiting prosecution by the applicants for a collective claim, individually or otherwise.

The application before court dated 7th February 2013 therefore has no basis, the same is not grounded on any issue that warrants the court intervention as the payers sought have already been arbitrated upon by this court and dispensed with. The issue of technicalities of the application not being in compliance with eh requirements as under the Industrial Court procedure Rules aside, this application serves no useful purpose. It should not have been filed in the first place.

I will therefore dismiss the application dated 7th February 2013, direct the applicants to fix their claim for hearing and the same be heard on merit. Costs will be awarded to the 3rd and 4th respondents.

Dated and delivered in open court this 24th of May 2013

**M. Mbaru
Judge**

In the presence of

Court clerk: Jacob Kipkirui

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