



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO 25 OF 2013

ABUBAKAR KILWA OMARCLAIMANT

VERSUS

SEAFARERS UNION OF KENYARESPONDENT

J U D G M E N T

on 26/7/2012 the claimant sued the respondent seeking the following various declarations orders, nullification of elections or appointments made during a special conference on 7/7/2012 and injunction orders to restrain the said new officials from holding themselves out as such and/or from transacting any business in the name of or on behalf of the first respondent. The grounds for the suit are that the purported special conference of 7/7/2012 was secretly convened and in contravention of the 1st respondent constitution.

The respondent 1st, 3rd, 4th and 5th did not file defence to the claim but only replying affidavits to the Notice of Motion filed with the claim.

The case was heard on 22/5/2013 when the claimant testified as CW1 and Daudi Hassan Haji testified for himself and the 1st, 4th and 5th respondents.

The 2nd respondent did not wish to call any witness but opted to file written submissions. CW1 told the court that he was the General Secretary (GS) for the

1st respondent from 2001 to 7/7/2012 and a member for COTU Board from 2005 to date. That he was lastly elected in march 2011 in a lawful election following a circular from the 2nd respondent but he however was removed on 7/7/2012 unlawfully a fact he learned from a friend and confirmed by the 2nd respondent. That he sought and obtained documents marked AKO3 which included minutes of the special conference that removed him plus letters requisitioning for the special meeting.

He however denied receipt of the letters for the requisition from the respondents as the General Secretary for the 1st respondent before the said conference.

According the procedure for calling a special conference for the 1st respondent it is either by the NEC of the union or requisition by 2/3 of fully paid members through the General Secretary of the union. In his view non of the above procedural options was followed to convey the special conference of 7/7/2012. That the letter dated 24/5/2012 purportedly requisitioning for the special conference was never served on him and it did not contain signatures of 2/3 of fully paid up members of the 1st respondent.

In addition, the list of attendants to the special conference on 7/7/2012 (AKO5) is not for members of the 1st respondent but includes members of a strange group called Seafarers Consultative Forum. That the minutes show that 10 officials were elected but the exhibit of the registered officials show 15 were elected.

In his view a special conference cannot elect officials of the union because the mandate is only reserved for the National Delegates Conference convened by the NEC of the union.

On the registration of the officials, he contended that the 2nd respondent failed to verify whether the elections were done properly. According to the CW1, the elections was a coup and prayed for its nullification.

On cross examination, he maintained that a person qualifies to join the union if he was a seaman holding identification documents called a CDC(passbook). He then must pay entry fee of Ksh.300 plus a monthly fee of Ksh.150.

That the list of members (AK05) showed the same membership number showed by more than one person including the claimant No. 20306. He denied preparing the list and attributed it to human errors on the part of the treasurer who collects the money.

He denied being notified of the special conference before it was held. That he only learned of the notice dated 24/6/2012 after he obtained a copy from the 2nd respondent. He maintained that ksh.150000/ must be paid to the union before the special conference is held but none was paid. He agreed that the union's postal address was P O Box 81655 Mombasa but denied receipt of any letter from the respondent.

He further maintained that the 3rd respondent was not a fully paid member on 7/7/2012 and denied that he (claimant) was preventing other people from joining membership of the union. He agreed that he was having a pending criminal case for making false documents relating to attendance to a meeting. He contended that all seafarers who were non-members of the union could not vote in the special conference. According to him, the people who attended the special conference of 7/7/2012 included non members who had not paid the registration fee and monthly subscription. He concluded that the special conference did not question his membership.

RW1 confirmed that a special conference of the union was held on 7/7/2012 following the legal procedure by writing a requisitioning letter (AK03) to the General Secretary. That the letter was posted to the claimant in addition to another letter to the Treasurer asking for details of the union account to enable them deposit Ksh.150,000/- for the special conference expenses.

That they also served Notice for the special conference on the General Secretary but no response was even received by the RW1. That the ksh.150000/ was used for the special conference held on 7/7/2012.

That the RW1 chaired the special conference as a convener and was eventually elected the chairman of the union while the 4th and 5th respondents were elected vice chairman and General Secretary respectively. That the meeting was attended by about 300 members of the union.

He clarified that on 5th and 6th September 2011, there was a meeting chaired by the government, the union and ITF where it was agreed to form a consultative forum with a mandate to revive the 1st respondent which was dead and left with only the board members existing as members. That the result of the consultative forum was the requisitioning of the special conference that was held on 7/7/2012. He went to say that the said management of the union had fully revised and even signed a CBA with the employers in the industry. That the union has now an office, postal, telephone, and email address and has embarked on training of members now being over 1000. That the union has been reinstated by the IFT and she is now receiving benefits including training, and job opportunities for members. That the union had received international recognition and the current General Secretary is now the Vice Chairman IFT Africa.

On cross examination he confirmed that the requisitioning letter was signed by the 4th respondent alone and sent by post. He admitted that the proof of posting is by stamp which he did not have as the letter did not have a postage stamp.

He also confirmed that the letter did not have any other signature except that of the 4th respondent. He also confirmed that Ksh.150000/- for the special conference was not paid to the treasurer under rule 5(a) of the union constitution.

He also agreed that he wrote the notice yet rule 5(b) provides for the General Secretary to write a notice to convene a special conference. He clarified that the consultative forum formed in 2011 included the claimant among other officials of the union.

He maintained that elections of officials were held on 7/7/2012 but maintained that people do not vote in special conference. He further maintained that special conference has the same provisions as the national conference.

He confirmed that rule 17 and 18 of the union constitution provided for elections only after 5 years to be done by secret ballot unless otherwise a case arises. He confirmed that the list of attendance (AKO3) referred to attendance at seafarers solidarity consultative forum. He maintained that the union had collapsed and he rejoined it on 5/10/2011 by paying Ksh.300/- but did not pay any monthly subscription thereafter because there were no officials.

He confirmed that Form E from the 2nd respondent (AK07) identified the unions registered office as postal office annex Mombasa but denied knowledge of the office. He maintained that other seafarers were blocked from joining the union after it was revived in 2011. He maintained that the consultative forum was not a registered entity and that the special conference was only for purposes of electing an interim management to prepare for next elections.

On the subscription of members, he submitted that the same could only be paid in arrears whenever they get jobs because the members were temporary employees. After the close of the hearing the parties filed submission.

I have carefully perused the pleadings and the submissions filed. I have also considered the witnesses testimonies and I am satisfied that I have the necessary jurisdiction to determinate the dispute under section 12 of the Industrial Court Act and Article 162 (2) (a) of the constitution of Kenya. The issues for determination in my view are:

1. **whether the procedure followed by the respondents to remove the claimant from office was unlawful.**
2. **Whether the reliefs sought ought to issue.**

Before answering to the issues for determination raised above, I wish to note that I have read the ruling by my sister Justice Monica Mbaru dated 28/9/2012 in which she made a finding that the meeting held on 7/7/2012 was lawful and the elections done thereby were legitimate. I have also note the said judge's observation that the question of members and their legitimacy was a matter of evidence in the main trial and not the Notice of Motion of which the ruling was about.

With the above in mind and in view of my earlier observation that the 1st,3rd,4th,&5th respondent did not file defence to the claim, I referred to the respondent constitution to answer the first issue.

For a special conference of the 1st respondent to be lawful and its business to be legitimate the person requisitioning for it must be qualified and the procedure for convening it under the constitution must be strictly observed.

The procedure for convening a special conference for the 1st respondent (union) is provided for under Rule 5 of her constitution thus:

“(a) special conference shall be convened by the Secretary General on directions of the Board or at written request of not less than 2/3 of fully paid members of the union each of whom shall be required to sign such requisition provided that the secretary general shall not be required to act on the requisition of members unless and until the sum of one thousand and fifty thousand (ksh150,000/) shall be paid to the treasurer for the purpose of defraying the cost of convening the meeting.....”

(b) A special conference shall have all the powers of an annual conference...it shall be commenced by the secretary general serving a two weeks notice to all members of the union.

(c) The quorum for special conference shall be 2/3 of the members entitled to attend and vote thereat.....”

The first hurdle to jump is whether the special conference was requisitioned by fully paid up members. Rule 3(c) of the union constitution provides that a member shall pay ksh.300 entrance fee and monthly subscription of ksh100 in addition to Ksh100/ per month to COTU.

From the foregoing provision it is clear that the respondent ought to have proved that the special conference was requested by members who had fully complied with rule 3(c) of the union constitution and that the procedure of convening the conference was fully compliant with rule 5 of the constitution. The catch words in rule 5(a) are “*fully paid members*” of the union at the time of requisition. It means that the requisitioning members had paid the ksh300 entrance fees and all the due monthly subscription of ksh100 plus ksh100 to COTU. Without such compliance, the persons requesting were disqualified by the law from requisitioning for the conference. Although rule 3(e) of the constitution on the right to vote is not applicable in special conference under rule 5 above, the said rule 5 provides that the person requisitioning must be fully paid members. In my view rule 3(e) and rule 5(a) are not in conflict because the former deals with the right to vote at the conference while the latter deals with the right to requisition for a special conference.

The hurdle towards legitimizing the conference of 7/7/2012 is to prove that the conference was requested by 2/3 of fully paid members of the union. In the present case the RW1 confirmed that the letter requested for the meeting was signed by one person. The other important hurdle for the respondent is to prove that the two weeks notice was served on all members of the union including the claimant which the 4th RW1 did not. He only said that the 4th respondent posted letters to the CW1.

Lastly, the respondent are required to prove that the special conference was attended by 2/3 of the members of the union who were entitled to vote thereat.

In my considered view the respondents have failed to rebut the claimants allegations that the special conference of 7/7/2012 did meet all the requirements under the rule 3 and 5 of the union constitution. From the evidence on record the requisition letter was signed by the 4th respondent only. Secondly, the persons requisitioning for the conference did not deposit with the union ksh.150,000/-as required by rule 5(a) of the union constitution. Lastly, the persons who attended the special conference were not 2/3 of members entitled to attend and vote thereat as per rule 3(c) of the union constitution.

If the list of attendance produced in court is anything to go by, then the participants at the conference were not members of the union but a group called Seafarers Solidarity consultative Forum. The same documents clearly shows that the meeting for 7/7/2012 at Koblenz hall was not a special conference of the union but a consultative forum for seafarers. The above view is corroborated by minute 3 of the special conference which dealt with registration of old and new members. The minutes said

“seafarers present were told that as at now, the union has got very few registered members. Members present were informed that recruitment drive will start immediately a new office is in place... receipts, bank account and many others have been acquired. Majority of the members present also expressed their willingness to register immediately once all the requirements are in place. Some were even ready to pay their registration fees immediately. However the meeting resolved that they must wait until everything is put in place.”

From the above, this court finds that the alleged special conference of the 1st respondent held on 7/7/2012 at Koblenz Hall, was not in accordance with the constitution of the union and all its business and resolutions were illegitimate and invalid as far as the affairs and leadership of the 1st respondent were concerned. Without belaboring the point, it means that the rights and status of the claimant as the secretary general of the 1st respondent was not affected by the resolutions of the Seafarers Solidarity Consultative Forum held on 7/7/2012 at Koblenz Hall because the said consultative forum was not a special conference of the 1st respondent within the meaning of rule 5 of the unions constitution.

Consequently the answer to the second issue for determination is in the affirmative. I will therefore grant the relief sought with slight alterations. I say alteration because the court has taken judicial notice that the union need to be revitalized for the benefit of the industry. The court has also noted the alleged milestones scored from the 7/7/2012 consultative forum which would be in right direction if legitimized. I believe this decision will go a long way to ring warning bells to both union members who aspire to ascend to union offices in breach of the law and also to the union officials who do not appreciate that unions are not personal ventures to be run whimsically. In my view the myths and stereotypes surrounding managements and politics of trade unions should be now demystified. In my view a trade union should be the model of good governance and an example to both the employers and the government. Instead we are witnessing in court wrangles in all levels of the unions leadership some of which has led to inefficiency and multiplicity of unions one industry.

In summary and in view of the fact, I now have the evidence which Judge Mbaru did not have, I now make the following orders;

- a. **the officials of the 1st respondent who were in office before the meeting of 7/7/2012 including the claimant and contained in the 2nd respondents certificate dated 25/11/2011 are declared to be the true and legitimately elected or appointed executive board members or officials of the 1st respondent.**
- b. **That all the persons indicated in 2nd respondents certificate dated 24/7/2012 including 3rd, 4th and 5th respondents allegedly elected or appointed on 7/7/2012 are declared to be not the true and legitimately elected and/or appointed executive board members or officials of the 1st respondent.**
- c. **The elections or appointments allegedly made on 7/7/2012 by an alleged special conference of the 1st respondent are declared null and void for being done in violation of the 1st respondent's constitution and the certificate of the alleged officials by the 2nd respondent dated 24/7/2012 is hereby quashed.**
- d. **The 3rd, 4th and 5th respondents and all other persons allegedly elected or appointed on 7/7/2012 whether by themselves, servants or their agents are hereby restrained from discharging any duties as officials or holding themselves out as the executive board members or officials of the 1st respondent including transacting any business in the name of or on behalf of the said 1st respondent.**
- e. **The claimant is hereby ordered together with the persons mentioned in (a) above to convene a special conference for all fully paid members of the union within 30 days of today to transact only one business of electing new officials to the executive board under the supervision of the Labour officer Mombasa**
- f. **That the persons mentioned in paragraph (b) above and any other person interested in the holding elections of new officials as per (e) above to jointly and/or severally deposit a total of ksh150000/- with the Treasurer contemplated in paragraph (a) above or the claimant within 14 days of today for use in defraying costs of the special conference ordered in (e) above.**
- g. **That if the said ksh.150000/ in (f) above is deposited in compliance to the said order (f) in 14 days of today, it will be deemed that no member if the 1st respondent is interested to have new officials elected and the claimant and his team will have to serve their entire term.**
- h. **For avoidance of any doubt, any contracts or CBA concluded by the officials in (b) above during the period they were in office shall remain in force unless revoked by the national conference of the 1st Respondent.**
- i. **The 1st, 3rd, 4th and 5th respondents to pay costs and interest to the claimant.**

Orders accordingly

Dated signed and delivered this 28th day of June 2013

ONESMUS MAKAU

JUDGE