



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

CAUSE NO. 1103 OF 2011

ALEXANDER MUTINDA PETER1ST CLAIMANT

KIRAITHE MWANGI2ND CLAIMANT

VERSUS

REGISTRAR OF TRADE UNIONS.....1ST RESPONDENT

KENYA LOCAL GOVERNMENT WORKERS UNION.2ND RESPONDENT

SAMUEL MUGWERU WAMBUI.....3RD RESPONDENT

MICHAEL MUTAHI WACHIRA.....4TH RESPONDENT

JULIUS M. OLE APALE5TH RESPONDENT

JUDGMENT

By a Memorandum of Claim dated 6th July 2011 and filed in court on 7th July 2013, the Claimants seek the following orders;

- a. Declaration that the election and registration of the 3rd and 4th respondents as a Third National Trustee and National Treasurer respectively were illegal, irregular and null and void.
- b. Permanent injunction to restrain the 3rd and 4th respondents from assuming office and/or discharging the duties as the third National Trustee and National treasurer of the of the 2nd respondent respectively.
- c. Declaration that the 1st and 2nd claimants are the bonfide third National trustee and the National treasurer respectively and should be registered as such by the 1st respondent.
- d. Costs of the claim.
- e. Any other or further relief which the court may deem just to order.

The Claimants applied for and were granted leave to amend the Memorandum of claim to include the 5th Respondent. The Amended Memorandum of claim which is unsigned was filed in court on 15th September 2011.

The case was heard by Justice E. K. Mukunya (now retired) on 29th September and 24th November 2012. Justice Mukunya retired and the file was allocated to me for determination. The parties thereafter filed their written submission.

Mr. Makau of O.N.Makau & co. Advocates represented the claimants. William Kibet Langat, the Registrar of Trade unions appeared for the 1st Respondent, Boniface Munyao, the Secretary General of Kenya Local governments workers Union appeared for the second Respondent while MS. Judith Guserwa of J.A Guserwa & co. Advocates represented the 3rd, 4th and 5th Respondents.

Both claimants testified in support of their case. Mr. William Langat testified for the 1st Respondent. The 3rd, 4th and 5th Respondents also testified.

The 1st claimant testified that he is employed by the County Council of Machakos and is the Branch Chairman of the Kenya Local Government Workers Union. That he participated in the union elections held on 18th June 2011 at Bondari college where he defended his seat as a National Trustee which he lost to the 3rd Respondent by 2 votes. His complaint was against 3 participants who were not eligible, that is Samuel Mugweru Wambui the 3rd Respondent, Julius Ole Apale the 5th Respondent and Michael Mutahi Wachira the 4th Respondent. That the 3rd claimant had been barred from participating in elections by a court order in Industrial Court cause no. 354 of 2011 and 412 of 2011, that the 5th Respondent was not eligible as he had retired on 31st December 2003. That 4th Respondent had been in arrears of payment of union dues from 1999 and therefore had ceased being a member of the union at Karatina Branch. That this was in violation of Rule 4 of the constitution of the union. That the 1st Respondent, illegally registered the elected officials presented by labour officers who presided over the elections. That the 2nd Respondent allowed holding of the National elections.

He prayed for an order nullifying the election of his opponent to whom he lost and be declared as the only elected, and an injunction to restrain the illegally elected officials from occupying their offices. He also prayed for costs.

Under cross examination by Ms. Guserwa he stated that he did not have a list of members of the 2nd Respondent, that the 3rd, 4th and 5th Respondents had been nominated, that he raised complaints over the irregularities of the complaints, that he would not know if a member paid subscriptions at the Branch, that he did not write to object to the elections and that the Industrial Court order in cause 354 of 2011 did not affect the elections of 18th June 2011. The second claimant testified that he was an employee of Murang'a County council and Branch Chairman of Kenya Local government workers Union, that he was challenging elections of the 3rd, 4th and 5th Respondents who were elected as 3rd Trustee, National Treasurer and Deputy Secretary General respectively on 18th June 2011 at the Annual General Meeting held at Bandari college. That the 5th Claimant was a retired employee of Mombasa Municipal Council and his election contravened section 33 of the labour Relations Act, that the 4th Respondent moved from Karatina to work at the Head Office and ceased being a member of Karatina Town Council and could not pay subscriptions through check-off from that branch. That he protested but was ignored. That he had interest in the office of National Treasure where he was competing with the 4th Respondent, that receipts produced by the 4th Respondent to prove payment of subscription through Karatina Branch were not stamped to show the paying station that the 4th Respondent's receipts show payment at Kshs.100/= per month yet union subscriptions had been increased to Kshs.200/= per months that he was in arrears, that for this reason his election was irregular.

That the 3rd Respondent was not properly elected to the Nairobi Branch as he had been barred by court order in Industrial court cause no. 354 of 2011. That he was aggrieved because he was disadvantaged by competition from a person who was not regularly nominated.

He prayed that the election of the 3rd, 4th and 5th Respondents be nullified and he be accepted as elected.

He further prayed that the 3rd, 4th and 5th Respondents be restrained from occupying the offices and for costs.

Under cross examination he stated that the 4th Respondent applied for 2 years leave and had not resigned, that he did not have documentary evidence that the 4th Respondent is not on the payroll of Karatina Town Council, that the 4th Respondent had no arrears of subscription for 2009 and had paid subscriptions for 2010 and 2011 in advance. That the 3rd, 4th and 5th Respondents were in the list of nominees. He also agreed that the name of the 5th Respondent was in the list of members who pay through Headquarters. He further admitted that the 3rd Respondent was not a party to cause no. 354 of 2011.

The 3rd respondent testified that he works for the City Council of Nairobi and was a member of the 2nd Respondent from 1999. That he pays union subscriptions through check-off as evidence by his pays lip which was Appendix 1 of his replying affidavit filed in court. That the union held elections on 18th June 2011 at Bandari College, that he participated in the elections and vied for the position of 3rd Trustee. That he qualified as he was nominated by 5 areas and had paid his subscription in full. That he won the seat. That the 1st claimant was his opponent. That the elections were free and fair and confirmed with the union constitution, were supervised by Labour officers and were subsequently registered. He asked the court to dismiss the claim.

Under cross examination the 3rd Respondent admitted that Cause no. 354 of 2011 challenged his election as Chairman of Nairobi Branch, that he is still Chairman of the branch, that he challenged the decision in the High court, which is still pending. That he has not obtained orders for stay, that he was qualified even if he did not represent any branch as he was nominated by 4 branches. He stated that there was no signing of any attendance register at the Annual Delegates Conference. That he gained 315 votes, that there were no complaints by other contestants that payment of union dues could be by cash.

The 4th Respondent testified that he works for the 2nd Respondent as National Treasurer having been elected on 18th June 2011. That he is a member of the 2nd Respondent since 1978 that he belongs to Karatina Municipal Branch and has been paying his union dues as and when required, that he pays in cash, annually in advance and is issued receipts by the Branch Treasurer. That he participated in the elections of 18th June 2011 and was nominated by 5 Area Committees as required by Rule 21 (e) of the union constitution. That the 2nd claimant opposed him, that he was declared winner, that the claims against him by the claimants are not true as he had been working for the 2nd Respondent since 2000, that he was previously the National Assistant Treasurer since 1994, that there were no objections to his elections and that he was only registered. He urged the court to dismiss the case.

In cross examination he stated qualified for the elections as he worked in the industry and was a member of Karatina Municipal council from where he had taken unpaid leave.

The 5th Respondent testified that he was the Deputy National General Secretary having been elected to the post on 18th June 2011 during the unions national elections, that he offered his candidature as he was a fully paid up member. That he was nominated by 5 area committees and was elected by 408 against 10 votes of his opponent's votes. That he was duly declared winner. That there were no irregularities or illegalities. He asked that the case be dismissed.

Under cross examination he stated that he is not an employee of any local authority but is the Deputy Secretary General, that he pays his dues by check-off, that his nomination was challenged in Cause no. 907 of 2011, that he did not testify in the case. That the case was dismissed.

Mr. Langat the Registrar of Trade Unions for the 1st Respondent testified that his office was notified by the union of the date of elections, that the notice was in accordance with the Union constitution, that the elections were carried out at Bandari college in Mombasa and that the elections took place as scheduled under the supervision of the Labour commissioner who subsequently filed a report in his office. That

pursuant to section 35 of the Labour Relations Act a notice of change of union officials in Forum Q with details of names and titles of all elected officers was forwarded to his office duly signed by the General Secretary of the union together with the proscribed fee within the stipulated period. That pursuant to the legal provision, having satisfied union self of the validity of the elections he proceeded to register the change in exercise of the discretionary powers granted by Section 35 of the Act. That at the time of registration his office had not received any objection on protests from any member or official of the 2nd Respondent. He urged the court to find no merit in the case and dismiss the same as an afterthought.

The Law relating to elections of trade union officers is contained in the Labour Relations Act as follows;

Section 34(1) of the Labour Relations Act, 2007 provides that ***“The election of officials of a trade union, employers’ organization or federation shall be conducted in accordance with their registered constitutions”***

“The eligibility to the membership of the Union shall be as follows;-

- a. ***Any worker employed in any capacity and in any office, post, in any Local Government in Kenya, irrespective of sex, colour or creed, and who is 16 years of age and over shall be accepted as a member, provided that he shall fill an application form for membership.***

Rule 4(f) provides:

“Any member who is in arrears of his subscription for a period of thirteen weeks shall not stand for elections as an officer bearer in the Union or its Branches, and any such member who actually holds an office at that time shall automatically cease to be an officer of the Union. Provided that such member may re-join the Union on payment of the arrears. Should such member wish to hold an office he shall have to seek re-lection”.

Rule 4 (e) provides as follows;

“Every member shall have to pay his subscription regularly, provided that the Branch Committee may allow any member to continue as such in case of non-payment of membership fees in the event of unemployment, sickness or other good cause”

Section 31(1) of the Labour Relation Act, 2007 provides;

“The officials of a trade union or employers’ organization shall be persons who are, or have been, engaged or employed in the sector for which the trade union or employers organization is registered”.

Subsection (4) therefore further provides,

“Notwithstanding the provisions of subsection (1)-

- a. ***the general secretary or a trade union or the chief executive or association secretary of employers’ organization may be a person not engaged or employed in the sector concerned;***
- b. ***...;and***
- c. ***the Registrar may, or application by a trade union or employers’ organization, permit any office to be filled by a person not engaged or employed in the sector concerned”.***

Section 35(3) and (4) of the Labour Relations act, 2007 which provides thus:

(3) Before registering any change of officials or correcting any register, the Registrar may require the production of any relevant evidence of the change.

(4) If, after inquiry, the Registrar is not satisfied as to the validity of any appointment or the

propriety of any proposed correction, the Registrar may refuse to register the change of officials or to correct the register.

I have considered the pleadings, the evidence adduced in court and the submissions of the parties and the relevant law. The Claimants in their amended Memorandum of Claim and in the written submission have challenged the election of the 3rd, 4th and 5th Respondents on the basis that they were illegible candidates, non-delegates and were therefore strangers in the elections, that their election and declaration as winners of the respective posts was irregular and in breach of the law and the 2nd Respondent's constitution.

The issues for determination are therefore the following;

1. Whether the 3rd, 4th and 5th Respondents were ineligible for election.
2. Whether any or all of them were irregularly declared a winner.
3. Whether the claimants are entitled to the prayers sought.

WHETHER THE 3RD, 4TH AND 5TH RESPONDENTS WERE INELIGIBLE IN ELECTION.

The 3rd Respondent is alleged to have been barred by a court order in Industrial court cause no. 412 of 2011 and 354 of 2011. The claimants did not produce a copy of the decision in 412/2011 of the court in that case to prove that indeed the 3rd claimant had been barred from participating in the elections. In this testimony under cross examination the 1st Claimant admitted that all the 3 respondents had been nominated to vie for the position in which they were elected, that he did not know if the 3rd Respondent paid their subscriptions in their branches, that they did not write to object to the elections to the Registrar of Trade Unions that the court order in cause no. 354 of 2011 does not affect the National elections held on 18th June 2011. I have looked at the decision of the court in cause no. 354 of 2011. The ruling was delivered on 14th September 2011, almost 3 months after the elections.

The second claimant also cited the decision in cause no. 354 of 2011 as the reason he contested the election of the 3rd Respondent.

From the foregoing the claimants have not proved that the 3rd respondent SAMUEL MUGWERU WAMBUI was not eligible to contest the position of 3rd trustee at the union elections held on 18th June 2011.

The 4th Respondent JULIUS MUTAHI WACHIRA is also alleged to have been ineligible for election to the position of National Treasurer on the grounds that he had ceased being an employee of Karatina town Council and was not remitting union subscriptions through check-off. It is further alleged that the receipts submitted by the 4th Respondent as evidence of payment of subscription at Karatina Branch of the 2nd Respondent were not stamped to show the paying station or the genuineness of the receipts. It is further alleged that the 4th respondent was in arrears of subscriptions and ineligible as he was paying subscriptions at shs.100/= per month when the subscription had been increased to shs.200/= per month and was in arrears. In cross examination both claimants stated they did not have list of members of Karatina Branch to confirm that the 4th Respondent was paid up member. The 4th Respondent in his evidence confirmed he was a fully paid up member and paid his subscriptions yearly in advance. That he had paid his subscriptions for 2009 and 2010 at Shs.100/= per month hence shs.1,200/= annually. He produced receipts to that effect. For 2011 he produced a receipt for shs.1,200/=. He testified that he had paid the subscriptions for 2011 at shs.1,200 per year before they were increased that even if the payment was spread at shs.200/= per month he was fully paid up by June 2011. On the court case, the ruling was delivered on 14th September 2011, about 3 months after elections.

I find that from the evidence on record the claimants have not proved that the 4th claimant was ineligible

for election to the position of Treasurer.

The 5th Claimant is alleged to have been ineligible by virtue of not being employed in the Industry contrary to Section 31(1) of the Labor Relations Act. That he retired from Mombasa Municipal Council on 31st December 2003. The 5th claimant testified that he paid his subscriptions through check-off and that his nomination as a delegate was challenged in Industrial court cause no. 907 of 2011 in which he did not testify but he is aware the case was dismissed. He was the Assistant National General Secretary of the 2nd Respodnet at the time of vying for the position of Deputy Secretary General and therefore qualified for election under section 31(1) of the Labour Relations Act and the constitution of the 2nd Respondent.

I find that the claimants have not proved that the 5th Respodnet was not eligible for nomination or election as Deputy General Secretary of the 2nd respondent a sat 18th June 2011 when he was elected.

Issue no. 2.

WHETHER THE 3RD, 4TH AND 5TH RESPONDENTS WERE IRREGULARLY DECLARED WINNERS.

Mr. William Langat, the Registrar of Trade Unions who is the 1st Respodnet herein testified that he received notification by the Secretary General of the 2nd Respodnet that National elections would be held at Bandari college, Mombasa on 18th June 2011, the elections did proceed as scheduled, that his office received Notice of Change of Officer Form, accompanied by a report from the labour officer who presided over the elections and having not receive any objection or protested from any contestants and having satisfied himself that the elections were in compliance with the law, proceeded to register the officials. Both claimants admitted in their testimony in court that they did not raise any complaint, protest or objection to the Registrar of Trade Unions either before or after the elections of 18th June 2011. They only claimed to have protested verbally to the presiding labour officer at the venue of elections but were unable to substantiate such protests. The 3rd, 4th and 5th respodnets testified that there were no protests over their declaration as winners at the elections.

For these reasons I find that the Claimants have not proved that the 3rd, 4th and 5th Respondents were irregularly declared as winners at the 2nd Respondents elections held on 18th June 2011.

ISSUE NO. 3

ARE THE CLAIMANTS ENTITLED TO THE RELIEFS SOUGHT

The claimants seek the following reliefs;

- a. Declaration that the election and registration of the 3rd and 4th respondents as a Third National Trustee and National Treasurer respectively were illegal, irregular and null and void.

As I have already found above, the claimants have failed to prove that the elections and subsequent registration of the 3rd, 4th and 5th claimants were illegal and irregular. I therefore dismiss this prayer.

- b. A Permanent injunction to restrain the 3rd and 4th respondents from assuming office and/or discharging the duties as the third National Trustee and National treasurer of the of the 2nd respondent respectively.

Having failed to establish that the elections and registration of the 3rd, 4th and 5th Respodnets were illegal and (or irregular, this prayer must also fail. I therefore dismiss the same.

- c. Declaration that the 1st and 2nd claimants are the bonfide third National trustee and the National

treasurer respectively and should be registered as such by the 1st respondent.

No evidence was lead by the claimants relating to their performance in the elections. Both claimants admitted that they did not win in the elections. In any event the law does not provide for a successful challenges of elections to be declared a winner. Once the elections are nullified the elections would have to be held afresh. In this particular case, the challenge of the elections has not been successful.

This claim must therefore also fail. I accordingly dismiss the same.

d. Costs of the Claim

Having failed to prove their case the claimants are not entitled to costs.

However taking all circumstances into account, I order that each party shall bear its costs.

I mentioned above that the Amended Memorandum of claim was not signed. The legal position is that any unsigned document are invalid. However since the Respondents did not raise the issue and went ahead to defend the Amended Memorandum of claim, I will make no orders in respect thereof.

Orders accordingly.

Read in open Court this 18TH day of JULY 2013

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

MS KINYUA H/B FOR MR. MUHEI for Claimant

MS OMONDI FOR 3RD – 5TH for Respondent