



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT KISUMU**

**MISC. CAUSE NO. 8 OF 2013**

(BEFORE HON.LADY JUSTICE HELLEN WASILWA ON 18/12/2013)

OGAJA OGAJA & EIGHT OTHERS..... CLAIMANTS

**-VERSUS-**

NORAH ROTICH AND FIVE OTHERS..... RESPONDENTS

**RULING**

The claimants herein filed this Application under Certificate of Urgency on 17.9.2013. The Application was brought through a Notice of Motion filed the same day. The 1st claimant Ogaja Ogaja was mandated by the other claimants to present this Application on their behalf. The Application was brought under the Provisions of the Labour Relation Act 2007, and the Constitution of the Kenya and of the Kenya Civil Servants Union.

No specific sections were cited however. The Applicants sought orders that:-

1. Leave be granted to the Applicants to present and prosecute the Application herein within and outside time.
2. The current application be certified urgent and the same be admitted for hearing ex-parte in the first instance.
3. The Hon. Court be pleased to consider the claims herein as grave so as to issue an interlocutory order of injunction restraining and barring the defendants/respondents from exercising the functions and authority of the national offices of the union of Kenya Civil servants, occupying the same, signing documents on behalf of the union and/or making any representation to the effect that they are union officials pending the hearing and determination of the Application herein interpartes.
4. The Hon. Court do issue an order for dissolution of the current office at all levels to pave ways for fresh election and establishment of the union legitimately.
5. An order or injunction restraining the officials from accessing, withdrawing and/or dealing with banks accounts with

Co-operative Bank, Moi Avenue Account No. 01120 12099 3000, National Bank, Harambee Avenue, Elimu Sacco Society Limited, FOSA Section, Tom Mboya Street in any manner whatsoever, however pending hearing and determination of the Application interpartes.

6. In the alternative the order of closure and/or freezing of the Accounts namely, Co-operative Bank, Moi Avenue A/c No. 01120 –1209 – 3000 and National Bank, Harambee Avenue in any manner be issued and be registered with the various accounts herein limiting withdrawal and interference with the accounts herein in any way whatsoever, however pending hearing interpartes.

7. The Hon. Court do immediately order forensic auditing of all the financial positions of the union for the period of 2007 to date.
8. The Court issues orders authorizing the Applicants/Claimants to immediately organize and constitute an interim caretaker committee to run the union pending quinquennial delegates and grass roots elections.
9. The Hon. Court do issue an order disbanding the committee making the Constitution scheduled for 17th and 18th September 2013 at Hotel Bounty situated within Nairobi South "B" and that its chairman or any member be restrained from discussing, tabling and handling its contents to the Secretary General or any organ of the union for adoption or to deal with it in any manner whatsoever, however till this application is heard and determined inter partes.
10. The current constitution making committee be declared illegal and be disbanded.
11. The current constitution in force be declared illegal, null and void and the interim caretaker committee officials revert to the old constitution that was illegally repealed for the running of union.
12. Cost of the suit.

The Application was grounded on the annexed Affidavit of Ogaja Ogaja and on the following grounds:-

1. Since the time the union was allowed to be formed in the year 2001 to date, the establishment and registration processes have been secured fraudulently through conspiracy between the Executive National Officials and the Registrar of Trade Unions.
2. The Respondents in this case and other organs of the union were not properly and constitutionally elected and created.
3. Since the year 2002 August 23rd when the union was registered, branches had been operating without properly constituted committees, no postal addresses and physical offices.
4. From the year 2007 to 2013 July, the union has been operating without Collective Bargaining Agreement.
5. The Respondents have created management crises in the union and threatens the existence of the union.
6. The respondents are misusing union properties and funds i.e. using union vehicles and funds by the Secretary General in pursuit of his personal parliamentary political ambitions in the last General Election.
7. By the time Kisumu Branch and the County elections were conducted, both Chairman Fred Omiti and the Secretary David Otieno Osodo were not members of the Kisumu County and therefore had no morals to contest in Kisumu County.
8. The Branch elections and county elections in Bondo and Siaya respectively were immorally and unlawfully conducted.
9. The constitution in force is inconsistent with the provisions of labour relation Act of 2007.
10. The Registrar of Trade Union has been compromised by the Respondents to the extent that he can no longer be trusted with management and supervision of the unions because he has demonstrating his partisan interests in solving disputes between members and the respondents.
11. The constitution making process and registration was meant to aid and abet scandals, impunity and corruption in the union.
12. The respondents have abdicated their responsibility of protecting member's interest and instead causing danger to the security of employments of members occasioning pressure for disintegration of the union or mass withdrawal from the same.
13. The union of Kenya Civil Servants has been turned into philanthropy for anybody willing to enter into politics and to achieve his personal gains.

The Applicants further submitted before this Court that though this trade union was allowed in 2001, it was fraudulently registered and therefore it is none existent. The Applicants pointed at the Union Constitution Rule No 1(b) which deals with the registered office of the union and they submit that the said office at Ufundi Plaza, 8th Floor, Moi Avenue Nairobi has never been used as the registered office of the Union since 2001.

The Applicants further contend that the Union is a giant with 74 branches Countrywide. However the 74 branches are not in law registered though they exist in the register. That there is also no physical address or addresses of the said branches. Some have bank accounts which are not functions.

The Applicants therefore prayed that this court declares the current Constitution a nullity and all done under it illegal. They specifically want this Court to order that the Applicants be allowed to form and constitute an office and run this Union in the interim and current officials to be ordered out of the office and all assets to be conserved. They submitted further that the union is not independent and this contravenes the requirements and the LRA Section 24 and 25.

The respondents opposed this Application. They filed their Replying Affidavit sworn by Tom Odege on 28/10/2013 which they relied on fully. They aver that there are no prayer sought as the statement of claim has just been filed.

They also submitted that this application is res judicata. They drew the Courts attention to the Notice of Motion prayer No. 4, 8, 9, 10 and 11 and an application filed by Abuodha & Onuno Advocates in Cause No. 1351 of 2012 where the same application was made with similar prayers as the current ones being sought. The prayers were allowed in the Industrial Court at Nairobi. The Parties were also the same ones save for one Job and Patrick who have been added. In the Nairobi case, a consent order was recorded settling all these issues and were signed by the Parties themselves. They asked court to dismiss the application.

The Applicants contend that the issue of res judicata does not arise as the consent was obtained fraudulently. They also contend that the issues are different as the issues in Nairobi concern mismanage of the Union and the current one is on legitimacy of the union.

I have considered the averments of the Parties. The issues for determination are as follows:-

1. Whether this application is res judicata.
2. Whether the Applicants are entitled to the orders sought.

A look at the pleadings herein show that the Applicants are referring Court to the Constitution of Kenya and the Constitution of the Civil Servants Union which they aver was flouted.

The Respondents on the other hand have referred court to previous Proceedings in Cause No. 1351/2012 which they contend handled similar issues. Infact the documents attached to the Replying Affidavit show exchanges between the Parties and the Court where the Applicants are similar in this case and in Cause No. 1351/2012 aver that they feel justice was not done to them.

The Notice of Motion in Cause No. 1351/2012 dated 8.8.2012 show the claimants as Duncan Odera Ogutu, Ogaja Ogaja, Benson Ambuni, Jeniffer Magore, Andrew Machoke Momanyi and Amos T. Kinyosi.

In this cause 258/13, the claimants are Ogaja Ogaja, John Webale, Patroba Ogudo, Amos Kinyosi, Benson Ambuni, Jeniffer Mogare and Andrew Momanyi. The similarity in the claimants is evident. The respondents are also the same.

In Cause 1351/12 Prayer No. 3 was as follows:

***“That the Hon. Court be pleased to issue an interlocutory order of injunction restraining and barring the defendants/respondents from exercising the function and authority of the National Offices of Union of Kenya Civil Servants occupying the same, signing documents on behalf of the union and/or making any representation to the effect that they are Union officials pending the hearing and determination of the application herein interpartes”***

Under Prayer 4 in Cause No. 1351/2012 the Prayer was

***“That the present Constitution be declared illegal, null and void and the Union Constitution do revert to the constitution undated and signed by the officials”***

It apparent that the claimants in Cause 1351/12 were dealing with issues of both legitimacy of the union under the Constitution and functions of the officials which are the same prayers being sought in the current cause. It is evident that what they are seeking before this Court are issues already ventilated upon and decided in Cause 1351/12.

This offends the provision of Section 7 of the Civil Procedure Act which states that

***“No Court shall try any suit an issue in which the matter directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit on the suit in which such issue has been subsequently raised and has been heard and finally decided by such Court”.***

I find that the current suit is res judicata and is therefore an abuse of the court process. This substantially determines this Application and I will not divulge on the second issue.

The Application therefore lacks merit and is dismissed accordingly with costs to the respondents.

**HELLEN WASILWA**

**JUDGE**

**18/12/2013**

**APPEARANCE:**

Claimant present

N/A for 5th respondent

Siganga holding brief Ligunya for 1st – 4th Respondents

C/c: Wamache Sammy