



NAIROBI COUNTY BRANCH OF KUPPET.....CLAIMANT

Vs.

LAWRENCE NJOROGE.....1STRESPONDENT

JAYNE EMISEMBE KABOSIA.....2NDRESPONDENT

SAMUEL KINYUA.....3RDRESPONDENT

MONICA GITHINJI.....4THRESPONDENT

SECRETARY GENERAL – KUPPET.....5THRESPONDENT

NATIONAL CHAIRMAN – KUPPET.....6THRESPONDENT

RULING

Before me is an Amended Notice of Motion dated 23rd July 2012 by the Claimant/Applicant seeking Orders of injunction against the 1st, 2nd, 3rd and 4th Respondent. It is supported by an Affidavit together with annexures, of the Claimant Benter Akinyi Opande. The Applicant also seeks to restrain the said Respondents from transacting the business of the KUPPET Nairobi County Branch including bank accounts of the said KUPPET Branch. It also introduced 2 new parties and removed the names of 2 Respondents. In addition a stay order was sought in respect of the changes effected in the office of the Branch Executive by the KUPPET Nairobi Branch. The Court directed that the Notice of Preliminary Objection be urged together with the reply to the Application for reasons that will become apparent in this Ruling.

Counsel for the Claimant/Applicant Mr. Rakoro urged the Application and submitted that the constitution of the KUPPET Nairobi Branch was repeatedly flouted in key aspects regarding the suspension of his client. Counsel submitted that there were material discrepancies on the date of suspension. In one affidavit sworn on 5th July 2012 by Lawrence Njoroge paragraph 8 alleges she was suspended on 22nd April 2012. This accords with the letter Annexed and marked BAO 3 in the Claimant's Affidavit in support of the Application. There is also an Annexure BAO 5 in which the suspension is given as 22/3/2012. The third date is given as 22nd May 2012 in a letter Ref. KUPPET/NRB/SIG/02/12 of 6th June 2012 to the Manager Equity Bank Fourway Branch Nairobi, which letter is annexed as Annexure LN 1(c) of the Affidavit of Lawrence Njoroge sworn on 26th July 2012 and filed on 27th July 2012. It was submitted that the documents were manufactured to facilitate the swaying of the Court that the Claimant was suspended. Article 5 of the KUPPET constitution Annexed as BAO 2 at Page 21 was referred. Counsel submitted that Branch Governing Council is constituted by the Branch Executive Committee. It was submitted that the Board was formed as per the Annexure BAO 4 at pages 36-40 of the exhibit annexed to the Affidavit of the Claimant. It was submitted there was no notice to the Claimant. It was further submitted that the Assistant Secretary Beatrice Mugenyi Wandera did not call the meeting in terms of Article 3 (b) of the KUPPET constitution. Claimant states she was not aware of her suspension until she filed Cause No. 918 of 2012. It was submitted that it is incumbent upon a Branch which initiates disciplinary process to inform the head office within 14 days. As per LN 4 in the Replying Affidavit of

Lawrence Njoroge the letter dated 30th May 2012 is 38 days after the BGC allegedly sat which it was submitted is contrary to Art. 6(5)(j) of the KUPPET Constitution. It was submitted that the Claimant was never invited to any NGC to discuss her alleged suspension as per Article 6(2) of the KUPPET constitution. Mr. Rakoro faulted the replying Affidavit by Maurice Akelo stating that National Executive Board had no power to ratify a suspension and that NGC cannot ratify the suspension of a sitting official. He urged the Court to allow the Application and apply the principles in **Giella v. Cassman Brown**. He submitted the suspension has occasioned hardship on the Claimant and the balance of convenience seriously favoured the Claimant. He stated that damages suffered if not remedied will not be remedied by costs at later time.

The Application is opposed and 3 Replying Affidavits were filed in opposition. A purported Notice of Preliminary Objection was also filed on 27th July 2012. Mr. Obok strenuously opposed the Application. He argued that the Application is an Amended Notice of Motion. He submitted that the 5th Respondent was cancelled out. He argued that Mr. Maurice Akelo Misoro Secretary General KUPPET was no longer a party to the suit and therefore there could be no reliance on his affidavit. Mr. Obok submitted that concerning the Preliminary Objection, the law was very clear. For a party to add or substitute another, there must be a formal application. He stated that on 16th July 2012 the Claimant was granted leave to amend her pleadings. The amendment did not include the addition of a new party. In this case there is a new 5th Respondent. In totality there are 2 new parties. While 2 parties were removed from the case. These are the previous 5th and 6th Respondents and this was done without any formal notice and without any formal application. He posed a question – Is the applicant Benter Akinyi Opande or is it KUPPET Nairobi Branch? He submitted that in view of the wording of prayer No. 2 of the Claimant/Applicant's Application it seemed the Claimant was KUPPET Nairobi branch. He submitted there was an addition of a claim and new orders have been substituted. He submitted that the Claimant has selectively sued members of the KUPPET Nairobi Branch and has just chosen a few. He referred to the KUPPET constitution and stated that the Claimant could not have been allowed to call a meeting to discuss her. He submitted further that the Claimant was absent without notice and the Minutes therefore made sense. Mr. Obok submitted that the Respondent had laid a basis in paragraph 8 of the Replying Affidavit sworn on 26th July 2012. He submitted there has been compliance with KUPPET regulations. The Claimant remains a member of the Union and has NOT been suspended but has been suspended from discharging the duties of Branch Secretary. Counsel further submitted it was doubtful the new 5th Respondent had been served.

Mr. Obok submitted that the National Governing Council had ratified the suspension of the Claimant. There was no evidence of authority for the Claimant to bring claim on behalf of KUPPET Nairobi Branch. The prayers should therefore be rejected.

In a brief reply Mr. Rakoro submitted that the amendments were in pursuance of a Court order on 16th July 2012 and that the same corresponded with Rule 14(6) of the Rules of the Court which permit a party to amend pleadings. He submitted there is no requirement for a formal application. He urged the Court not to disregard the Affidavit of Mr. Akelo. He submitted that under Section 21 of the Labour Relations Act, the Union which is a body corporate can sue and be sued. The Branch on the other hand cannot be sued in its name but through its officials the 1st-4th Respondents.

The Court did not entertain the Notice of Preliminary Objection *in limine* on the basis that the Notice filed on 27th July 2012 was not a preliminary objection. In view of the manner the Notice was couched, the Court is minded to restate the principles of a preliminary objection. From the onset, the Court reiterates that a preliminary objection can be taken at any time.

The Notice of Preliminary Objection dated 27th July 2012 was in the following terms:-

1. The Amended Notice of Motion Application dated 23rd July 2012 and her Supplementary Affidavit sworn on the same day contravene fundamental provisions of the law.
2. The Claimant's Amended Statement of Claim dated 23rd July 2012 contravenes fundamental provisions of the law.

A preliminary objection is in the nature of what used to be a *demurrer*. It raises a pure point of law. A preliminary objection consists of a point of law which has been pleaded or which arises by very clear implication out of the pleadings, and which, if argued as a preliminary objection, may dispose of the matter. Examples are an objection to the jurisdiction of the court, or a plea of *res judicata*, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration and the like.

The aim of a preliminary objection is to save the court time and ensure the parties do not needlessly go into the merits of an application because there is a point of law that will dispose of the matter *in limine* (at the start). It cannot be raised if any fact has to be ascertained or if the exercise of judicial discretion is sought.

A preliminary objection must raise pure points of law and not general grounds raised to oppose the application on its merits. I am emboldened by the finding in **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd [1969] E.A. 696**.

A preliminary objection per Law J.A. was stated to be thus:-

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Charles Newbold P. stated in the same judgment:-

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

In view of the above what was filed was NOT a Preliminary Objection but something akin to Grounds of Objection. In light of this the Court proposed to deal with it alongside the opposition to the Application as it was not by any stretch of the imagination a Preliminary objection.

In responding to the Claimant's Application Mr. Obok made a very pointed argument regarding the amendments undertaken by Mr. Rakoro. He submitted that for an amendment to be made there must be a formal application. I am not persuaded that that is the correct position in law. The Court is allowed the discretion to permit amendment at any stage of the proceedings. The amendment can be oral, formal or as directed by the Court. In **Jenipher Gumba Oyoo v. Kenindia Assurance Company Limited [2011] eKLR** the Hon. Mr. Justice Makhandia (sitting at Kisii High Court) held that **“a court has the discretion to grant an application for amendment of pleadings at any stage of the proceedings with the main purpose being the determination of the real questions in controversy between the parties.”**

The law regarding amendments of pleadings is well settled by the Court of Appeal for Eastern African in the case of *Eastern Bakery v. Castelino* (1958) EA 461 where at page 462 the Court held:-

“It would be sufficient for purposes of the present case to say that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costsThe court will not refuse to allow an amendment simply because it introduces a new case.....The Court will refuse leave to amend where the amendment would change the action into one of a substantially different character or where the amendment would prejudice the rights of the opposite party existing at the date of the amendment, e.g. by depriving him of a defence of limitation accrued since the issue of the writ

The main principle is that an amendment should not be allowed if it causes injustice to the other

side.”

In the Court of Appeal case of Joseph Ochieng & 2 Others v. First National Bank of Chicago C.A. No. 149 of 1991, Shah J.A (as he then was) held:-

“The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true,

substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages) that as a general rule however late the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that exact nature of proposed amendment sought ought to be formulated and be submitted to other side and the court; that adjournment should be given to the other side if necessary if an amendment is to be allowed; that if the court is not satisfied as to the truth and substantiality of proposed amendment it ought to be disallowed; that the proposed amendment must not be immaterial or useless or merely technical; that where the Plaintiff’s claim as originally framed is unsupportable an amendment which would leave the claim equally unsupportable will not be allowed; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that the Plaintiff will not be allowed to reframe his case or his claim if by an amendment of the Plaint the Defendant would be deprived of his right to rely on Limitation Acts but subject however to powers of court to still allow such an amendment notwithstanding the expiry of current period of Limitation; that the court has powers even (in special circumstances) to allow an amendment adding or substituting a new cause of action if the same arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to seek the amendment.

These are of course the principles upon which the courts act in allowing or disallowing any proposed amendments and our Order VI A Rule 3 sets out all such principles which have been gone into on many previous occasions.”

In **Charles Ndirangu Kamau & 6 Others V William Kimani Thuku & 5 Others [2012] eKLR** the Hon. Mr. Justice G. K. Kimondo stated thus in a Ruling delivered on 19th April 2012

“ True, this court has power and wide discretion to allow amendment of pleadings at any time before judgment. See Kenyatta National Hospital Vs Kenya Commercial Bank Limited [2003] E A 528, D.T. Dobie Vs Muchina [1982] KLR 1, Eastern Bakery Vs Castelino [1958] E.A 461 and Leroka Vs MiddleAfrica Finance Company Limited [1990] KLR 549”

I associate myself fully with the findings of my brother Judges from the Courts of Appeal and the High Court.

The foregoing are therefore the principles that the courts apply when dealing with an application such as the one under consideration.

That said, does the amendment made meet the criteria for amendment? I posit that the Claimant/Applicant has made a mockery of procedure and the calling into aid the Industrial Court (Procedure) Rules 2010 and in particular Rule 14(6) does not detract from the provisions obtaining in jurisdictions such as the one in this Court. A party who wishes to make material alterations to a Claim must of necessity make it formally. This provides an opponent the opportunity to oppose or even be aware of the proposed amendment. The leave granted on 16th July 2012 for amendment was not a *carte blanche* for the Claimant to make such fundamental alterations to the claim. In the end result, I would in the premises strike out, as I hereby do, the offending prayer inserted together with the addition of parties in the suit. In short, the Motion as Amended would stand as if there were no amendments made. I make this determination minded as I am that it is trite law striking out parts of pleadings is a drastic measure which is sparingly done. See **DT Dobie and Co. Limited v. Muchina [1982] KLR** per Madan JA.

In hearing the Application, the Court was extensively referred to sections and Clauses of the KUPPET constitution. In light of the issues in the dispute, the Court has had to consider the merits of the Application without the amendments. The suspension of Benter Akinyi Opande is for all intents and purposes the gravamen of the Claim and the ensuing interlocutory applications.

The Constitution of Kenya recognises the rights of parties and gives wide realms of standing. This Court is enjoined by the Constitution to breathe life into it. The Court draws its origin and ethos from the words of the Constitution which provides under Article 159 as follows:-

159. (1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(a) justice shall be done to all, irrespective of status;

(b) justice shall not be delayed;

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

(d) justice shall be administered without undue regard to procedural technicalities; and

(e) the purpose and principles of this Constitution shall be protected and promoted.

(3) Traditional dispute resolution mechanisms shall not be used in a way that-

(a) contravenes the Bill of Rights;

(b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or

(c) is inconsistent with this Constitution or any written law.

In this case Article 159(2)(a) and (2)(d) apply on all fours. As it is incumbent upon this Court to do justice as between the parties with the overriding objective being to ensure justice is done, I find that Benter Akinyi Opande is rightly before this Court.

The elaborate provisions on the various steps pre-requisite to suspension places KUPPET in the realm of a quasi-judicial authority. Quasi judicial authorities must follow precepts of justice such as rules of procedure and should uphold the principles of natural justice. Was Benter Akinyi Opande given such an opportunity to enjoy the benefit of due process?

Natural justice is a term of art that has gained prominence in all law jurisdictions. In Common law jurisdictions the term denotes specific procedural rights. This has in recent times been replaced and broadened into the class of the general 'duty to act fairly'. What is required to fulfil this duty depends on the context in which the matter arises.

There are two rules that natural justice is concerned with. These are the rule against bias *nemo iudex in causa sua* – one cannot be a judge in their own cause. The second is *audi alteram partem* – no one is to be condemned unheard. In this case, the second cardinal rule of natural justice is at play.

In the case of **D'Souza v. Tanga County Council [1961] E.A. 377** it was settled that the law requires that prescribed disciplinary procedures would in the circumstances have to be followed and even if no procedure were prescribed, some form of inquiry would have to be conducted and any tribunal set up must endeavour to attain fair determination. The person accused must know the nature of the accusation and be given a fair hearing.

This was re-iterated in the Court of Appeal decision in **Onyango v. Attorney-General [1987] KLR 711**. In this case it was held that even where there was no relevant statutory provision, a public authority to which such quasi judicial authority has been entrusted, will adhere to the rules of natural justice.

Nowhere has it been demonstrated that Benter Akinyi Opande was heard by the various organs of KUPPET. She only heard of the issue of her suspension almost as a by the way. The cardinal rule ***audi alteram partem*** was breached flagrantly and this Court cannot countenance that. The suspension is stated on oath to have been made on 3 different dates!! It cannot be possible and indeed it may seem documents were manufactured to align certain decisions with documents! The proceedings culminating in the suspension of the Secretary of KUPPET Nairobi Branch do not accord with the requirement of the rules of natural justice. In view of this finding, the Order that commends itself to me to make, as I hereby do, is one restoring Benter Akinyi Opande as branch Secretary of KUPPET Nairobi County Branch. The balance of the Claim will abide full hearing of the Claim.

In coming to this decision, the Court has taken into account all the pleadings in the case. Once filed, pleadings unless expunged from the record remain as part of the record and unless there has been a recall of the same, they are relevant. In this case, the Affidavit of Mr. Maurice Akelo Misoro cannot be resiled from. It forms part of the Respondent's pleadings.

The final clincher is the case of **Giella v. Cassman Brown & Co. Ltd [1973] E.A. 358**. This case has gathered notoriety in its over application. It is still sound law but one capable of improvement. In this case, the Court held that in granting an injunction, a court will consider the grant of injunction on the settled principles enunciated by the leading decision of Justice Spry, Vice President of the East Africa Court of Appeal at pages 359, 360 and 361.

First, the applicant must show a ***prima facie*** case with a probability of success, secondly, it must be demonstrated that the applicant might suffer irreparable injury if the injunction is not issued and thirdly, should the court be in doubt, it will decide the application on a balance of convenience.

To my mind, these principles are to be applied sequentially. The Court need not consider the second and third principles if it finds that the applicant has a ***prima facie*** case. If the three are considered one after the other, the last is the balance of convenience and in this case it falls in favour of the Claimant Applicant.

The reliefs this Court can grant have been extensively analysed by the Hon. Mr. Justice D. S. Majanja in ***United States International University (USIU) v Attorney General [2012] eKLR*** a well considered decision delivered on 3rd August 2012 which I invite Counsel to read.

The reliefs sought are anchored on the Constitution and are supplemented by the provisions of Section 12 of the Industrial Court Act 2011, which provides as follows:-

12. (3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders—

(i) interim preservation orders including injunctions in cases of urgency;

(ii) a prohibitory order;

(iii) an order for specific performance;

(iv) a declaratory order;

(v) an award of compensation in any circumstances contemplated under this Act or any written law;

(vi) an award of damages in any circumstances contemplated under this Act or any written law;

(vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or

(viii) any other appropriate relief as the Court may deem fit to grant. (emphasis mine)

In the final result, the Application succeeds in terms of the unamended prayer 3 and prayer 4 of the Notice of Motion dated 23rd July 2012. And *ex abundanti cautela*, for avoidance of doubt, Benter Akinyi Opande is reinstated as branch Secretary of KUPPET Nairobi County Branch and an Order of specific performance issues as the natural consequence to Nairobi KUPPET Branch to ensure the reinstatement is done immediately. Costs of this Application will be borne by the 1st, 2nd, 3rd and 4th Respondents.

It is so ordered.

Dated and Delivered at Nairobi this 23rd day of August 2012.

Nzioki wa Makau
JUDGE