



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 735 OF 2012

KENYA FEDERATION OF LABOUR.....1ST CLAIMANT

KENYA AFRICAN WORKER CONGRESS.....2ND CLAIMANT

Versus

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE REGISTRAR OF TRADE UNIONS.....2ND RESPONDENT

THE CENTRAL ORGANISATION OF TRADE UNIONS(COTU)...3RD RESPONDENT

RULING

Before me is a ground breaking Application seeking to declare actions taken by the Government in 1965 unconstitutional. The Notice of Motion dated 3rd May 2012 was filed by the 1st and 2nd Claimants jointly.

The Notice of Motion Application in the main sought the following Orders:

3. That this Honourable Court issue an injunctive order prohibiting the Secretary General of the Central Organization of Trade Unions (Kenya) all officials of C.O.T.U (K) and its employees from carrying out any activities of the workers of this country until this matter is heard and determined.
4. That this Honourable Court issues an injunctive order freezing all the accounts being operated by the Central Organization of Trade Unions (Kenya) on behalf of Kenyan workers
5. That this Honourable Court issues an injunctive order directing the Central Organization of Trade Unions employees and officials to keep 200 meters distance away from the assets of the Kenya Federation of Labour and the Kenya African Workers Congress, being illegally occupied and used by the C.O.T.U (K) including Solidarity House here in Nairobi and Tom Mboya Labour Colleges in Mombasa and Kisumu, until this matter is heard and determined.
6. That this Honourable Court issues an injunctive order prohibiting all the nominees of C.O.T.U (K) from representing Kenyan workers in any international/regional workers organisations or conferences until this matter is heard and determined.
7. That this Honourable Court issues an injunctive order prohibiting the nominees of C.O.T.U (K) from attending any meetings of any arm of the Government purporting to be doing so on behalf of the Kenyan workers, until this matter is heard and determined.
8. That this Honourable Court issues order directing the National Labour Board of Kenya to continue transacting its business without the nominees of C.O.T.U (K) until this matter is heard and

determined.

9. That this Honourable Court issues and orders directing that these orders be served on all financial institutions in Kenya, International Labour Organisation, and the Attorney General to direct all arms of Government affected by this order forthwith.

Grounds upon which the Application was predicated were on the face of the Motion as well as prayers sought.

When the matter came up for hearing on 26th September 2012, Ms. Nthiga for the 1st and 2nd Respondents indicated to Court that the matter though fixed for hearing, had Notice of Motion dated 3rd May 2012 which was pending. She indicated there was also a Memorandum of Claim dated 3rd May 2012 by the 1st and 2nd Claimants. The 1st and 2nd Respondents had filed a Notice of Preliminary Objection dated 28th May 2012 which was also pending. She sought to abandon the preliminary objection and subject to directions from Court was of the view that the orders sought in the Notice of Motion dated 3rd May 2012 were substantially the same as sought in the Memorandum of Claim and in her view the Memorandum of Claim could be disposed of through the application. Mr. Angoya for the 1st and Mr. Munayi for the 2nd Claimant were both in agreement with the proposal.

The Court acceded to the request as Ms Guserwa was said to be ready to proceed and only needed time allocation. The Court set the hearing of the matter at 10.00 a.m. At the time when the matter was called out for hearing of the Application the appearances were Mr. Angoya for 1st Claimant, Mr. Munayi for 2nd Claimant and Ms. Nthiga for the 1st and 2nd Respondents and Ms. Guserwa for the 3rd Respondent.

Mr. Munayi who was to urge the Application on behalf of both Claimants, submitted that as a result of an unlawful and unconstitutional Act meted against the workers of this Country on 30th June 1965 by the Head of State the Late Mzee Jomo Kenyatta appointed a Ministerial Committee to look into the affairs of Trade Unions in this country and after 4 sittings by the Committee a report was prepared and handed over to the Government. The report of the Ministerial Committee is marked MJ1 in the Memorandum of Claim. He submitted that the Committee made recommendations that the 2 umbrella worker organizations – Kenya Federation of Labour the 1st Claimant herein and the Kenya African Workers Congress the 2nd Claimant herein be deregistered with immediate effect. He submitted that the assets and finances of the 2 worker organizations were to be confiscated and frozen, and the Government created an umbrella worker organization by the name Central Organization of Trade Unions (COTU (K)) to which all trade unions be forced to affiliate to. It was submitted that the affiliations by all the local trade unions to regional and international organizations be cancelled forthwith. It was submitted that the Secretary General of the created umbrella worker organization COTU was henceforth to become a presidential appointee from a panel of 3 names which were to be submitted to the President for appointment. It was also recommended that fresh elections be carried out for all the unions in the country which elections were to be organized and supervised by the Government. On receipt of these recommendations by the Ministerial Committee it was stated, the Head of State and the Government for that matter moved on and deregistered the 2 umbrella worker organizations and declared their activities illegal. It was submitted that the Government also ordered the assets and finances of the two worker umbrella organizations frozen and confiscated. It was submitted that COTU was subsequently ascribed the role of managing the said finances and assets that belonged to the workers unions. Mr. Munayi further submitted that the effect of the unlawful act as meted out upon workers was such as to deprive the workers of their constitutional rights to freedom of association. Their assets and finances were also unlawfully and illegally confiscated from them. He submitted that since 1965 when this act was committed against the workers Kenyan workers have never even been represented in any forum, local or internationally as pertains to their issues. It was submitted that the Government has since continued to illegally and unlawfully occupy the premises and assets of the workers in total disregard to their right to own those properties and manage their own affairs. Reference was made to the text by the President in the opening remarks and submission made that the acknowledgement was that the act being meted out on the workers was unlawful and unconstitutional. S. 75 of the former Constitution was referred to in the mistaken belief that the Section was the same in the 1963 Constitution. It was submitted that the conditions listed for justification of the compulsory

acquisition of one's property did not anywhere meet the minimum threshold that was meted out on the Kenyan worker by the acts complained of. He referred to the provisions of Article 41 of the Constitution and added that in Article 36 of the same Constitution at Article 36(1) there is a right to freedom of association and in sub article (2) a person shall not be compelled to join an association of any kind.

References were made to the ILO Conventions 87 and 98 *in extenso*. In particular emphasis was placed on Article 4 of Convention 87 and Article 2 of Convention 98. He then proceeded to state with pomp that in matters of employment and labour relations convention 87 and 98 stand in place of the Constitution of this country.

In closing it was submitted that Section 4(1)(a) of the Labour Relations Act gave the worker the right to form federations of their own choosing. It does not confer the right on any administrative organ to form an organization on behalf of workers. In this case it was alleged that the Government exceeded its powers when it moved to prescribe the two worker organizations. He urged that the workers in this country were pleading with this Court to come to their assistance by granting the orders as prayed for in the claim so that they can begin to organize themselves and enjoy their rights as affirmed by the Constitution.

The 2nd Claimant opted to make a response after the submissions by 1st and 2nd Respondents. Ms Nthiga deferred to Ms Guserwa her senior to go first. Ms. Guserwa in opposing the Claim and the Application stated that the parties before Court were improperly before Court and her three pronged attack was as follows:-

1. The application has been filed by people who lack *locus standi* to file this matter. In the mature of the claimants as they stand now, they do not exist in law. By their own admission the representatives of the 2nd Claimant has stated that the 2 bodies were deregistered in 1965 pursuant to the ministerial report. We have not been given the exact date when they were revived and came back to life and can mercifully plead that their rights were infringed upon 47 years ago. To that end there are not parties before you to whom you can grant the orders.
2. The representatives of the 2 bodies have not said who they are whether they are advocates, whether they are trade unionists and as such they have no legal mandate to argue the case before Court.
3. These applicants have filed a Notice of Motion without a supporting affidavit in which they could depose to all these historical matters which they have raised before Court. Those matters should have been contained in an affidavit to enable the Respondents respond to those issues. The omission to file a supporting affidavit is in violation of Rule 14 and 16 of this Court's Rules. To that end the Notice of Motion is fatally defective and inevitably it must collapse.

Counsel submitted that other than the policy document referred to and annexed as MJK1 in the same year 1965, Parliament enacted the Trade Unions 1965 Act Cap 234 (now repealed and replaced by the Labour Relations Act of 2007). The legislations have been governing the Registration, management of trade unions and employers organization together with general labour relations subsisting between all workers and all employers. It was urged that the 3rd Respondent was lawfully registered under the Trade Unions Act 1965 and has been operating as a lawfully registered as a Central Organisation of Trade Unions open to free affiliation (not forced as has been alleged) by any other lawful registered trade union within the jurisdiction of Kenya. The Respondent and its Affiliates are open to free affiliation to international bodies like the ILO and other relevant organizations that have dealings with the unions internationally.

It was submitted that there was no basis to claim that the property of the Claimants was taken some 47 odd years ago. The application was filed on the 3rd of May 2012 during the regime of the Constitution of Kenya 2010. Indeed this Constitution rates very highly on the bill of rights as they accrue to workers, individuals and everybody. Ms. Guserwa submitted that this Constitution has not come in to replace what is called violation of claimant's rights that were purportedly violated via a policy document and not legislation. Even if there was a cause of action in 1965 that cause of action will be defeated in law by the principle of time bar. It is alleged COTU has not annexed a document showing how it came into existence. The law is very clear – whoever alleges must prove. The burden of proof never shifts in these civil matters.

A challenge had been raised in respect of the pleadings but because it was misplaced, the submissions of Counsel would suffice to answer the misconception by the Claimants. Ms Guserwa addressed the issues thus: the affidavit sworn by Francis Atwoli for the 3rd Respondent is stated to be invalid and that the lawyer who drew it should have deponed to it.

Ms Guserwa challenged the further affidavit by the Claimants (the Applicants) and stated that the document is misplaced in that we cannot have a further affidavit in the absence of a first affidavit. The purported affidavit is not commissioned by a Commissioner for Oaths or a Magistrate and as such the document cannot stand in any Court as an affidavit for that reason.

The short answer to that is that it would be against the provisions of the Oaths and Statutory declarations Act. A lawyer cannot commission a document drawn by his/her firm. Indeed the further affidavit by the Claimants was defective in form as the jurat was not in conformity with the Oaths and Statutory Declarations Act. The argument by the Claimants was misplaced due to misunderstanding of legal provisions relating to affidavits.

Ms. Nthiga on behalf of the 1st and 2nd Respondents submitted that this suit is time barred. The cause of action arose in 1965. It is now 47 years since then and the Claimants have not given any explanation to justify the delay. Reliance for this was placed on the case of Nyamu J (as he then was) in **Constitutional Application No. 128 of 2006 – In the matter of Peter Ngare Kahume & Others v. The Attorney General (unreported)** which was reiterated in the case of **Wachira Waihere V. Ag High Court Misc. Application No. 1184 of 2003 (unreported)**.

She submitted that the 1st and 2nd Claimants came to Court on the premise that the actions of 1st and 2nd Respondent were unlawful. The actions of the Registrar had acted within the law in cancelling the registrations of the Claimants under Section 17(1) of the Trade Unions Act now repealed.

On the allegations that the decision by the President in 1965 was unlawful and illegal in adopting the recommendations of the Ministerial Committee that the 2 trade unions be dissolved, an answer was provided that under Article 20(4) of the Constitution, a constitutional right and fundamental freedom may be limited. It was submitted that the public interest as at that time was of importance and the actions by the 1st and 2nd Respondents outweighed the competing rights and interest of the 1st and 2nd Claimants.

As regards the grant of injunctive Orders sought, Ms. Nthiga submitted that guided by the case of **Giella v. Cassman Brown Co. Ltd. (1973) EA 358** conditions of precedent to granting injunctive orders had not been met. To bolster that position the Court of Appeal case of **East African Development Bank v. Hyundai Motors (K) Ltd [2006] eKLR** was cited.

The issues that the Court has distilled for determination are four.

1. Is the Claim time barred?
2. Do the 1st and 2nd Claimants have locus?
3. Is the Motion without a supporting affidavit proper?
4. Have the Claimants demonstrated sufficient grounds for grant of injunctive orders?

1. **Is the Claim time barred?**

A Claim expressed to seek to enforce rights that accrued in 1965 would of necessity have to conform to provisions of law. The Limitation of Actions Act cap 22 Laws of Kenya provides that such a Claim be presented within 12 years in respect of land and 6 years in respect of torts. Over 47 years have lapsed and nothing has been placed before Court seeking to enlarge time. Time bar would apply as the Claim is time barred.

2. **Locus standi**

Locus standi is defined by Black's Law Dictionary Ninth Edition as **the right to bring an action or the right to be heard in a given forum**. *Locus standi* is Latin for 'place of standing'. The Claimants are stated to be Kenya Federation of Labour and Kenya African Workers Congress. These bodies came into existence in rather interesting circumstances. The very first trade union regulations in Kenya were made through Ordinance No. 35 of 1939 which required all crafts organisations to apply for registration. The registration could be granted or denied depending on whether they had legitimate dealings consistent with government policy of the time. Cancellation of registration under the Ordinance was not subject to appeal or open to question in a court of law. In 1948, in order to gain a complete hold on the wage earners organisations, the Colonial government brought in a Trade Union Labour Officer, attached to the Labour Department with the duty to foster "responsible" unionism. The Trade Unions Act was enacted in 1952. It sought to rigidly control the activities of Unions. At independence in 1963, four registered Unions served the needs of the workers and these were the East African Trade Union Congress (EATUC), Kenya Federation of Registered Trade Unions (KFRTU), Kenya Federation of Labour (KFL) and Kenya Africa Workers Congress (KAWC). Names such as that of Thomas Joseph Odhiambo Mboya, Makhan Singh, Frederick Polworth Kubai (better known as Fred Kubai) were connected to the nascent trade union movement prior to independence.

Upon the dissolution in 1965, 1st and 2nd Claimants ceased to exist. Reflected against the definition of *locus standi* above can the 1st and 2nd Claimants have capacity to appear before me? The 1st and 2nd Claimants in the document headed Further Affidavit filed on 6th August 2012 stated Mr. Dishon Angoya is acting for the first workers organisation because after the organisation was dissolved and deregistered they lost their *locus standi* in law to institute any proceedings in its own name. On the part of the 2nd Claimant it was stated that Mr. Isaac Opondo Munayi is acting for the second workers organisation because after the organisation was dissolved and deregistered they lost their *locus standi* in law to institute any proceedings in its own name.

The Court finds that the 1st and 2nd Claimants have no *locus standi* in this case due to the deregistration in 1965. If Mr. Munayi or Mr. Angoya were acting in person they would have rights of standing. The Constitution of Kenya under Article 22(2) makes provisions which the Claimants could have sought refuge under.

3. Is the Motion without supporting affidavit proper?

Under the Industrial Court (Procedure) Rules 2010 Rule 16(5) provides relief to the Claimants as follows:-

Rule 16 (5) A notice of motion shall state in general terms the grounds of the application and where the motion is supported by an affidavit, both the notice of motion and a copy of the affidavit shall be served.

(emphasis mine)

The Motion before court though unsupported by affidavit complies with the provisions of Rule 16(5).

4. Have the Claimants demonstrated sufficient grounds for grant of injunctive orders?

In the case of **East African Development Bank v. Hyundai Motors Kenya Limited [2006] eKLR** it was held by the Court of Appeal that where a party does not establish a *prima facie* case with a probability of success there would not be any grant of injunctive orders. This was reiterating the position in the oft cited case of **Giella v. Cassman Brown Co. Ltd. (1973) EA 358** in which Spry Vice President of the East Africa Court of Appeal stated that the principles to be considered are as follows:

1. First, the applicant must show a *prima facie* case with a probability of success.
2. secondly, it must be demonstrated that the applicant might suffer irreparable injury if the

- injunction is not issued and
3. thirdly, should the court be in doubt, it will decide the application on a balance of convenience.

To my mind the test for these three principles are to be applied sequentially. There is no *prima facie* case with a probability of success. No irreparable loss is anticipated in absence of the orders. The balance of convenience does not tilt in favour of the Claimants. In short, the case before Court fails the test on all three fronts.

In parting just so that the Claimants might be informed, firstly, within the bounds of this great nation of Kenya no convention however noble supercedes the Constitution of the Republic of Kenya. Secondly Section 14 of the Independence Constitution is what provided protections to self and property. See Section 14(c). Thirdly the remarks of the First President of the Republic of Kenya Mzee Jomo Kenyatta were commiserations and must be read in context.

In the final result, the Claimants Application dated 3rd May 2012 and the Memorandum of Claim are dismissed with costs to the Respondents.

Dated and delivered at Nairobi this 10th day of October 2012.

Nzioki wa Makau

JUDGE