



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1147 of 2012,1056, 1354, 1604, 2233, 808, 36, 791 & 1746 of 2011

ROBERT N. LICHORO..... 1ST CLAIMANT

AVIATION & ALLIED WORKERS UNION 2ND CLAIMANT

VS

BONNE N. BARASA 1ST RESPONDENT

REGISTRAR OF TRADE UNIONS 2ND RESPONDENT

DANIEL YATICH..... 3RD RESPONDENT

RULING

1. Mr. Nyamu Advocate
2. Ms. Ashubwe Advocate
3. Mr. Kitheka Advocate
4. Mr. Arum Advocate
5. Mr. Rakoro Advocate
6. Mr. Metho Advocate
7. Mr.Mengich Advocate

On 17th October 2012, the officials of the Aviation and Allied Workers Union (K) appeared before me in court and made an Application to record a consent Agreement with regard to the following matters:-

1. Industrial Court Cause No.808 of 2012
2. Industrial Court Cause No.1604 of 2012
3. Industrial Court Cause No.1147 of 2012
4. Industrial Court Cause No.1354 of 2012
5. Industrial Court Cause No.1056 of 2012
6. Industrial Court Cause no.160 of 2010
7. Industrial Court cause No.36 of 2012
8. 791 of 2012
9. 1746 of 2011

The most significant effect of the Consent Award was as follows:-

1. To rescind suspension of Union officials and reinstate them into office;
2. To rescind the amendment of the Union Constitution and revert to the old document;

3. To Authorise payment of Union officials in arrears;
4. To compromise all the named cases pending before the Industrial Court;
5. To authorize Bank transactions in the various union accounts that had hitherto been frozen and appoint new signatories;
6. To regulate Governance of the Union operations and protection of the Assets of the Union by the Trustees;
7. To regulate union remittances to the branches; and
8. To usher harmonious relationship between the Antagonists in the various disputes and ensure smooth and transparent running of the Union.

In the main, the Award has in total 20 Clauses aimed at resolving the many wrangles between the current officials of the Union and some members who include the immediate past Chairman of the Union, the Treasurer and some members.

The negotiations that culminated in a consent Award of 17th October, 2012 were precipitated by a Ruling by Hon. Justice Rika delivered on 26th September, 2012 which consolidated causes 1056 of 2012; 1354 of 2012; 1147 of 2012 and 1604 of 2012 and directed that All Bank Accounts of the Union are frozen until the Court issues other orders. The judge further directed that no more suits are to be registered with the court until further orders of the court were issued.

The 12 warring parties were immediately driven to negotiations since the orders of the court had the effect of paralyzing all the activities of the Union.

It therefore came as a great relief to the parties when consent was reached and the same was recorded as an order of the court on 17th October, 2012.

This relief was however, short lived as two urgent Applications were filed immediately in opposition to the Award.

Interim orders were issued thereof pending the hearing and determination of the matter.

The first Application under Certificate of Urgency was filed on 19th October, 2012 being Cause No.2233 of 2012 by Timothy Muchiri and 9 others on behalf of the members of the Aviation and Airport Service Workers Union against Aviation and Airport Services Workers Union and 8 others.

The main grounds of the Application were that the Respondents (who were party to the Consent Award of 7th October, 2012) had disbursed Union's funds in excess of Kshs.50,000,000 for the past one year without budgetary estimates and without lawful approval contrary to the Constitution; that they had recorded a consent order and obtained an award that mandates trustees to be signatories of Bank Accounts while their being in office is illegal and subject of a court dispute and their tenure is contrary to the Constitution and are likely to divert the Union funds; that the Consent Orders reinstates the 4th Respondent to office as a Treasurer while he is still under investigations and/or facing disciplinary action; that the officials of the Union are sharply divided and most of the employees who are members of the Union do not know the faction in office legitimately. That there are multiple suits pending in court challenging the validity of the officials pending hearing and determination; that the consent Award is in bad faith and is likely to lead to massive loss of members' funds unless this court issues conservatory orders sought.

The matter was heard on 29th October, 2012 and Interim Orders were issued in terms of

prayers 2, 3 and 4 of the Notice of Motion. The effect of the Interim order was to issue an injunction to stop the 2nd to 8th Respondents or any other person acting on their behalf to implement the Consent Award of 17th October, 2012.

The other one was filed on 6th November, 2012 seeking an order to join Mr. Stephen Nyanota and Abubakar Mohamed for and on behalf of the Airlines Branch of the 2nd Claimant in the Consolidated Cause Nos.1056, 1354, 1147 and 1604 of 2012 as an Interested Party and to order a Stay of Execution of the Consent Order of 17th October, 2012 with regard to Clause No.7 thereof pending the hearing of the Application *interparties* and the court be pleased to set aside Clause 7 of the Award.

Meanwhile all the parties agreed to commence a pretrial Conference to frame the issues for determination so as to dispose of all the pending suits between the parties once and for all to ensure proper functioning of the Union

whose activities had been paralyzed by continued wrangling and pending suits.

A consolidated statement of issues with respect to Cause Nos.1056/2012; 1354/2012; 1604/2012; 2233/2012; 160/2010; 36/2012; And 1746/2011 was framed by the parties and filed on 23rd November, 2012. The parties also filed written submissions and highlighted them accordingly. This was pursuant to a Consent Order recorded on 6th November, 2012 before the Principal Judge.

Therein was also agreed that an Independent Financial Audit of all financial position of the Union for the last five (5) years be conducted immediately and the report of the Audit be submitted to court within 30 days from 6th November, 2012. The officials of the Union, who comprise the Respondents in Cause No. 2233/2012 were directed to provide to the Auditor all Bank Accounts and Bank Statements to facilitate the process.

The matter was heard on 3rd and 5th December, 2012 when the parties highlighted their written submissions.

At the outset all the parties conceded the matter raised by Mr. Kitheka

Advocate in the Consolidated Cause Nos. 1050, 1354, 1147 and 160 of 2012

filed on 19th October, 2012 that Clause 7 or order 7 of the Consent Award of 17th October, 2012 was ill conceived and the same should be struck off. The reason for this was that the subject matter of Clause 7 arose from Cause No.160 of 2010 which involves 12 parties who are not connected with the matters the subject of the Consent Award of 17th October, 2012. That the parties did not make the necessary disclosures to the court which if made would have led to the exclusion of Clause 7 in the Consent Award.

The Court is satisfied that the reasons proffered by Mr. Kitheka are sufficient to warrant a review of the Consent Award of 17th October, 2012 so as to strike off Clause 7 thereof and the Court Orders accordingly.

The issues framed for determination as are follows:-

1. Whether the consent Award recorded in court on 17th October, 2012 is proper and/or valid and whether the consent Award was done properly, legally and whether it's binding on parties herein.
2. Whether elections were held and whether the officials in the extract

were duly elected on 13th February 2011 and whether the 3rd Respondent was duly elected and properly in office and whether he can be granted the orders sought in the application dated 19th October 2012 and the suit.

3. Whether the union had funds held in A/C No.0120061115400 held at National Bank of Kenya Harambee Avenue have been misappropriated and/or embezzled at all and whether an audit can be done on frozen accounts in light of court orders obtained on 29th October 2012 and 6th November 2012.
4. Whether the union is run, managed constitutionally and whether the Orders granted vide the Application dated 6th November 2012 and 19th October 2012 have grounded the operations of the union and whether the said Applications and suits/or claims are properly before the Court.
5. Whether the amendment to the Union constitution and the change of name were done in accordance with the union's Constitution?
6. Does the Union constitution show how officials are elected/appointed/removed?
7. Whether the Union has complied with the directives (if any) from the Registrar of Trade Unions?
8. Were any funds transferred on the **31st October, 2012** from account **01020061115400** and who authorized the transfer? And whether orders obtained on 29th October 2012 and 6th November 2012 had been served on all parties or whether the contemnors or their Advocates on record had been served before the transfer.
9. The officials who transferred funds are in contempt of Court of the Court orders herein.
10. Who should pay the costs of the application filed by the 3rd Respondent.
11. Who should meet the costs of the suits/claims and who should pay the legal fees for the Advocates of the Parties?

It is important from the outset to note that all the parties who participated

in the crafting of the Consent Award of 17th October, 2012 support the enforcement of the Award with the exception of Mr. Daniel Yatich who in the Consent Award was replaced as the Treasurer of the Union and was Appointed the Director of Education.

The thrust of the opposition to the Consent Award of 17th October 2012, is contained in the submissions by Mr. Mengich Advocate dated 26th November 2012, filed on behalf of Mr. Daniel Yatich, the 3rd Respondent in Cause No.1147 of 2012; Mr. Metto Advocate for the Claimant/Applicant in Cause No.2233 of 2012 and Mr. Rakoro Advocate on behalf of the 1st Respondent in Cause No. 36 of 2012 and the Claimant in Cause No.1746 of 2011.

Issue No.1 – Whether the Consent Award recorded in Court on 17th

October, 2012 is proper/or valid and whether the Consent Award was done properly, legally and whether it is binding on parties herein:-

With regards to this matter, the opposition may be outlined as follows:-

1. That the Consent order violates the Ruling of Justice Rika of 26th September, 2012, that of Justice Kosgei in Cause No.808 of 2012 and that of Justice Linet Ndolo of 16th October, 2012.
2. That Mr. Daniel Yatich, the Treasurer of the Union as well as the members were not consulted, hence Mr. Yatich did not sign it.
3. That the matters of transfer of monies from one account to another, amendment of Union Constitution and the change of the Union officials were improperly handled in the Consent and therefore, the Award was invalid.
4. That the Union Officials, party to the Consent Order are not in office legally, and therefore lack authority to compromise the pending suits.
5. That the said officials have misappropriated union funds and therefore ought not to remain in office.

The common thread in the various submissions is that the Court should set aside the Consent Order in view of the above allegations; An Independent Audit be undertaken; that fresh elections be called and/or the Union be deregistered.

On the other hand, Ms. Ashubwe from J.A. Guserwa and Company Advocates; Mr. Nyamu Advocate; Mr. Otieno Arum Advocate and Mr. Nyabena

Advocate presented a common front. Their arguments in the main are as follows:-

That subsequent to the order of Justice Rika, referred to earlier in this ruling, there was urgency in finding a solution to the wrangles that threatened to suffocate the Union, hence negotiations were commenced by the parties under the Auspices of COTU. That all the parties to the pending disputes, except with regard to Cause No.160 of 2010 were well represented in the negotiations.

That Consent Agreement was arrived at and signed on 15th October,

2012 by all the parties except Mr. Daniel Yatich who was duly represented in the talks by the firm of J.A. Guserwa & Company Advocates who were on record for him in Cause No.114 of 2012. That the firm endorsed the Consent Agreement on 16th October, 2012 following instructions from its clients Mr. Bonnes Nicholas Baraza and Daniel Yatich. The firm was on record for the two officials of the Union until the time the Consent was recorded as an Award of the Court on 17th October, 2012. Ms. Ashubwe submits that it is mischievous for Daniel Yatich to purport to renege from the Consent when he had duly instructed them and did not serve them a Notice of Change of Advocates in the matter prior to the filing of an Application to set aside the Award on 19th October, 2012. The said Notice of Change of Advocates was served on them on 26th November, 2012.

The Advocates submit that the Consent Award was done legally, same is valid and binding on the parties as was entered into freely and voluntarily and without duress, same was not entered into by mistake or by fraudulent misrepresentations and was overseen by the umbrella Federation COTU to which the Union is affiliated.

That the order of Justice Rika of 26th September 2012 and that of Justice Ndolo in 808 of 2012 did not bar any out of court initiatives by the parties which they went ahead to undertake in arriving at an out of Court Settlement that was recorded as an Award of the Court.

The submissions by Mr. Nyamu and Mr. Arum confirm the position by Ms. Ashubwe to the effect that the firm of Guserwa had participated in the Crafting of the Consent and in fact appeared in Court on his behalf when the Consent was recorded.

It was further submitted that the orders made on 29th October, 2012 and extended to date would only serve to further cause instability in the Union. That pursuant to the Consent Award, and as at the time of filing in Court the Notice of Motion dated 19th October, 2012 effect had been given to the settlement reached where change of officers of the Union had been registered replacing the names of the Applicant as the Treasurer and the cheques the subject matter of Cause No.1354 of 2012 had already been released by the Equity Bank. The claims mentioned in the order have therefore been overtaken by events.

That the dispute regarding the election of officials touching on Cause No. 2233 of 2012 and related issues ought to be addressed in a Special Delegates

Conference convened upon requisition by members as provided under the Union Constitution.

That the nine Applicants in Cause No.2233/2012 have not demonstrated *Locus Standi* as they have not been mandated by the members to bring the suit on their behalf and the Application should be dismissed on that ground alone.

That upon the recording of the Consent Award and consequently registration of change of officers, the only persons who may purport to maintain suit on behalf of the union are the duly registered officers as per the extract from the Registrar of Trade Unions signed on the 22nd October, 2012.

The Trustees who under the Union Constitution are the custodians of the assets of the Trade Union are parties to the Consent and have compromised their claim in Cause No.1604 of 2012.

That the matters in issue in Causes No.36 and 791 of 2012 should not affect the Consent and the Union promised to abide by the outcome of the cases. The Respondents pray that the Notice of Motion dated 9th October 2012,

be dismissed with costs to the claimants in Cause No.1147 of 2012 and uphold the Consent Award made on 17th October, 2011.

Upon a careful consideration of the Notice of Motion, the grounds thereof and the Supporting Affidavit of Timothy Muchiri, the 1st Applicant in Cause No. 2233 of 2012. It is clear that Mr. Timothy Muchiri does not disclose in what capacity he has brought this suit against the Respondents. He concedes in paragraph 6 of the Supporting Affidavit that the 2nd, 3rd and 4th Respondents are present officials of the Union, the 5th Respondent is the immediate former National Treasurer, the 6th, 7th and 8th Respondents are the trustees of the Union.

Indeed all the signatories to the Consent Award are confirmed as the officials of the Union in the Consent Order of the Court in Cause No. 808 of 2012 recorded on 22nd May, 2012 by Justice Kosgei.

Clearly, the Applicants in Cause No.2233 of 2012 lack capacity to move the Court to set aside an award entered into by Consent to which they were not

parties. Secondly, they lack *Locus Standi in judicio* to represent the Union in

Court as they are not officials of the Union. Their recourse as members is within the provisions of the Constitution to invalidate any purported illegal activities by the elected officials and/or the Trustees of the Union.

With respect to Mr. Daniel Yatich, the extract from the Register of Trade Unions officers, Trustees and Committee members dated 18th October, 2012

and the record of the award in Cause No.808 of 2012 does not reflect him as an

official of the Union, pursuant to the results of elections registered on 13th February, 2011. However, he subsequently became a Treasurer under Circumstances which are not clear to the court. The Consent Agreement which the Court finds that he participated in crafting removed him from the office of the Treasurer to that of the Director of Education. The Court finds that he cannot be heard to renege from the said Consent Order and seek to set it aside. He has recourse however, in terms of Rule 32 of the Industrial Court (Procedure) Rules, 2010 to seek review of the Consent Award of the Court dated 17th October,

2012 on the very limited grounds permissible in judicial Review.

Issue No.2 – Whether elections were held and whether the officials in the extract were duly elected on 13th February 2011 and whether the 3rd Respondent – Daniel Yatich was properly in office and whether he can be granted orders sought in the application dated 19th October 2012 and the suit.

This issue is well covered in the written submissions of Mr. Rokoro Advocate in Cause No.36 of 2012 and Cause No.1746 of 2011 and the submissions of Mr. Metto Advocate in Cause No.2233 of 2012.

Their submissions may be summarized as follows:-

1. That the National Elections of the Union held on 13th February, 2011 were unlawful and therefore null and void, *abinitio* because the National Delegates Conference pursuant to which the elections were conducted was held in contravention of the Constitution of the Union in that:-
 - (i) Non-members of the NEC participated contrary to Rule 12(b) of the Union's Constitution.
 - (ii) There was no notice of this purported NEC contrary to the provisions of Rule 12(d) of the Union's Constitution.
 - (iii) There was no quorum contrary to Rule 12(b) & (d) of the Union's Constitution.
 - (iv) That the then registered Chairperson of the Union did not chair the Delegates' Conference contrary to Rule 15(a) and (c) of the Union's Constitution and even the alleged ad-hoc Chairman of the day, Mr. Daniel Yatich was not properly appointed and did not sign the minutes and he has denied attending the meeting.

Mr. Nyabena Advocate in his written submissions has drawn the attention of the court to the provisions of Section 30 of the Labour Relations Act, 2007 which provides:-

“Any person aggrieved by a decision of the Registrar made under this Act may appeal to the Industrial Court against that decision within thirty (30) days of the decision.”

The elections of the Union officials was conducted on 13th February, 2011 and the Registrar of Trade Unions registered officials who were elected thereat on 15th February, 2011. Any person aggrieved by that decision was obliged to file an appeal on or before 16th March, 2011.

The Claimant in Cause No.791 of did not file the suit until 17th October, 2012, a period of six months thereafter. No extension of time was sought before filing the suit and no application to extend time is pending. This matter goes to the jurisdiction of the court to entertain the matter and the suit should be dismissed with costs.

Furthermore one Moss Ndiema filed Cause No.328/2012 against the union seeking same orders as in this matter and the same was dismissed by Justice Kosgei on 25th August, 2011.

There was no Appeal nor review against the decision of the Court. These material facts were not disclosed to the court.

Mr. Nyabena further submits that this being a case challenging elections, it is important that oral evidence be led to prove some averments in the statement of claim.

Mr. Otieno Arum in his submissions reiterated that, the Applicants in Cause No.36 of 2012 and 1746 of 2011 and 2233/2012 lack mandate to represent other members of the Union as they have not

demonstrated such authority in their pleadings. The allegations of wrangling within the union are also misplaced since these issues were settled in Cause No.808 of 2012 through the Court award dated 22nd May, 2012 which stands unchallenged to date. He further submitted that claims Nos. 36 of 2012 and 1746 of 2011 are settled having been dismissed by courts of competent jurisdiction and are *res-judicata*. That all the consolidated claims were settled and the claimants have no further interest in pursuing the same. That upon recording the Consent Award of 17th October, 2012 and consequent registration of the change of officials, they are the only ones who have mandate to file claims on behalf of the Union.

That the Union is not averse to proper Auditing of the Accounts and this will be done in compliance with the Court Order. That Cause No.36 of 2012, 1746 of 2011 and 2233 of 2012 be dismissed with costs for want of mandate to sue the union.

Mr. Rakoro seeks a declaratory order that the purported National Elections of the Union held on 13th February, 2011 were sham elections, unlawful and against the Union's Constitution and thus *null* and *void ab initio* and the same should be nullified and quashed. He further seeks a permanent injunction restraining the operationalisation of the Extract of Union officials issued by the Registrar of Trade Unions on 15th February, 2011 and the officials be permanently restrained from assuming and or holding office and discharging their duties and functions as officials of the said union pending the holding of fresh, proper, free and fair elections and an order directing that National Elections of the Union be held afresh as per the Union's Constitution and the law.

The Court has fully considered the lengthy submissions by all counsel and commends all of them in cooperating to frame the statement of issues for determination and agreeing to consolidate all the matters between the parties pending before court so as to seek a permanent solution to the disputes that plague the union and in particular resolve the wrangling of officials and establish proper use and accountability of the funds of the members held in trust by the Union and Authorised Union officials.

The court is of the realization that if the Consent Award of the court dated 17th October, 2012 is upheld, all the other issues fall away except those subsequently agreed upon by the parties to the Consent award and/or matters that are capable of implementation without nullifying the Consent Order.

In the matter of *Benson Mbucu Gichuki Vs Evans Kamende Munjua & 2 Others (2008) eKLR, Civil Appeal 304 of 2006*.

The judges were considering a decision of the High Court that had upheld a Consent Order granted on 30th June, 1999 and was partly implemented before one party sought to have it reviewed and set aside. The appellant was aggrieved by the refusal to set aside the Consent Order. The appellant had alleged that the Consent Order was obtained through fraud and collusion among other grounds.

The judges stated:-

“the appellant was required to demonstrate to the superior court either that he had discovered a new and important matter which after exercise of due diligence was not within his knowledge or which he could not produce, when he, together with the respondents drafted and signed a handwritten consent that they handed over to the learned judge for endorsement and to be made a judgment of the court or that there was a mistake or error on the face of the record i.e. the learned judge made a mistake or an error in reducing the same consent judgment they drafted when the learned judge endorsed it a judgment of the court or show any other sufficient reason why the consent judgment need to be reviewed.”

The law as stated by the Appellate court is in line with Rule 32(1) a-f of the Industrial Court (Procedure) Rules, 2010.

The Court went on to say these principles:-

“apply in general to all cases where an applicant is seeking a review of the decree or order. However, in

cases where an applicant seeks a review and setting aside of a judgment or ruling that was recorded pursuant to a consent by the parties, the law requires something more. This is because the law treats a consent of parties as a contract between those parties and that being so, the law requires that reviewing and setting aside such an order or a decree is the same as setting aside a consent judgment like in this case”.

In the well known case of *Flora N. Wasike Vs Destumo Wambuko (1982-88) 1KAR 625 the C.A.* stated as follows:-

“It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside or if certain conditions remain to be fulfilled which are not carried out.”

The Court has accepted the submissions by the eleven officials of the Union who signed the Consent Agreement through their Advocates that they did so freely and voluntarily and brought to court for recording as an award of the court. The court has further accepted the submissions by Ms Ashubwe that the firm of Guserwa & Company Advocates had full instructions to represent Mr. Daniel Yatich, the only party who now is opposed to the Consent Agreement. Even if the court were to find to the contrary, the Consent Agreement is binding as between all the other 11 signatories and Mr. Daniel Yatich can only opt out of it. Because the court has found as a matter of fact, that he did participate fully in its conclusions and was represented also by Guserwa & Company Advocates who were on record representing him upto the time the Consent Award was entered, he is bound by the terms thereof.

The effect of this finding is that all the terms of the Consent Award of 17th October, 2012 remain in place except Clause 7 thereof which was expunched by Consent of all the parties. This clause was with regard to Cause No.160 of 2010. All other suits consolidated by consent of the parties and in respect of which statement of issues in consolidated suits/causes Nos.1056/2012; 1354/2012; 1604/2012; 2233/2012; 808/201236/2012 and 1740/2012 are now terminated by the judgment of this court respecting any/other determination by other courts previously made in 36/2012 and 1746/2011 . Cause No. 791/2012 will take its full cause to conclusion and the parties herein shall abide by its outcome.

Having said that, the Court reiterates the Consent Order entered into by the parties herein on 6th November, 2012 wherein all these matters were consolidated and in particular the directive that a Financial Audit of all financial positions of the union for the last five years be conducted immediately and the report of the Audit be submitted to court within 30 days. Given that much energy was directed at resolving these disputes before court, the period within which to complete the Audit is extended by a further 30 days and the same be submitted to the court accordingly.

The court further notes that the rights of the members of the Union in terms of the Union’s Constitution with respect to matters that affect them are not inhibited by the judgment of the Court and are free to take whatever measures as may be permitted by the Union Constitution in furtherance of their freedom of Association.

In the final analysis the Court orders as follows:-

- 1. The Consent Award of 17th October, 2012 is proper and valid and the same is varied only to the extent of expunching Clause 7 thereof.**
- 2. That the Extract of the Aviation & Allied Workers Union (Kenya) officials issued by the Registrar of Trade Unions on 13th February, 2011 is valid until any other lawful election of the officials and Trustees of the Union is conducted as per the provisions of the Union’s Constitution.**
- 3. That all actions done by the duly elected Union Officials pursuant to the Consent Order of 17th October, 2012 are legitimate and valid to the extent the same are in compliance with the law and the Union Constitution.**

4. Audited Accounts of the Union for the past 5 years be conducted by an Independent Firm of Auditors and the Report be submitted to the Court within 30 days from todote.

4. That no order as to costs is made.

It is so ordered.

DATED and DELIVERED in Nairobi this 13th day of December 2012.

Mathews N. Nduma

PRINCIPAL JUDGE