



Case Number:	Civil Suit 261 of 1994
Date Delivered:	02 Jun 1994
Case Class:	Civil
Court:	High Court at Mombasa
Case Action:	Ruling
Judge:	Isaac Charles Cheskaki Wambilyangah
Citation:	Salim & others v Dock Workers Union & others [1994] eKLR
Advocates:	Mrs Khaminwa for the Applicants/Plaintiffs Mr Ochuka for the Respondents
Case Summary:	<p>Salim & others v Dock Workers Union & others</p> <p>High Court, at Mombasa June 2, 1994</p> <p>Wambilyangah J</p> <p>Civil Suit No 261 of 1994</p> <p><i>Civil Practice and Procedure – injunction – temporary injunction – application for – factors to be considered before granting temporary injunction.</i></p> <p>The plaintiffs filed suit against the defendants alleging that the defendants had raised subscriptions by substantial percentage contrary to rule 3 of the Union's Constitution. They further stated that the defendants had failed to hold an annual conference, they had failed to hold elections for the office bearers after their term of 5 years expired, that they failed to display the audited accounts in conspicuous manner etc. They therefore sought injunction prohibiting the defendants from dealing with the money and assets of the Dock Workers Union; and from levying the raised subscription from members. The</p>

	<p>2nd defendant swore and filed two affidavits and he neither controverted plaintiff's allegation nor did he offer an explanation of the circumstances which may have militated against the holding of the annual conference.</p> <p>Held:</p> <ol style="list-style-type: none"> 1. The requirement to hold the annual conference was both mandatory and fundamental. 2. Although the 2nd defendant swore and filed two affidavits in the application, he neither controverted plaintiff's allegation nor did he offer an explanation of circumstances which may have militated against holding of the annual conference. 3. Special conference was held irregularly and its deliberations lacked the binding effect on its members. <p><i>Application allowed.</i></p> <p>Cases</p> <p><i>Giella v Cassman Brown & Co Ltd [1973] EA 358</i></p> <p>Statutes</p> <p>Civil Procedure Rules (cap 21 Sub Leg) order XXXIX rules 1, 2, 3</p> <p>Advocates</p> <p><i>Mrs Khaminwa</i> for the Applicants/Plaintiffs</p> <p><i>Mr Ochuka</i> for the Respondents</p>
Court Division:	Civil
History Magistrates:	-
County:	Mombasa
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application Allowed.
History County:	-
Representation By Advocates:	Both Parties Represented

Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT NO. 261 OF 1994

SALIM & OTHERS.....PLAINTIFFS

VERSUS

DOCK WORKERS UNION & OTHERS.....DEFENDANTS

RULING

There are 11 plaintiffs who filed the suit against the defendants. They assert that they do so on their own behalf and on behalf of many other members of the Dock Workers Union.

Their claim is expressed in para 5 of the plaint. They allege:

(a) The defendants have raised the membership subscriptions by substantial percentage contrary to rule 3 of the Unions Constitution.

(b) That the defendants have failed or refused to hold an annual conference contrary to rule 4 of the Constitution

(c) That the defendant have failed or refused to hold the elections for the office bearers after their term of 5 years had expired.

(d) The defendants have failed or refused to prepare and supply or display the audited accounts in a conspicuous manner at the registered office

(e) The defendants have refused or failed to perform their duties under the Constitution of the Union.

(g) The defendants have frustrated, intimidated and suppressed the plaintiffs whenever the plaintiff asked for a general meeting.

Some of the reliefs sought are a restraining order to prohibit the defendants from dealing with the money and assets of the Dock Workers Union; and from levying the raised subscription from members.

By the present chamber summons under order XXXIX rules 1,2,3 of the Civil Procedure Rules the plaintiffs ask the Court to impose injunction orders against the defendants; ie to restrain them from dealing with the Union's money in the bank, cash at hand and all other Union assets; and from levying the raised subscriptions until their suit is determined.

Matters of interlocutory injunctions such as the ones sought here are governed by the principles which were enunciated in the case of *Giella v Casman Brown* [1973] EA 358. This Court has to satisfy itself the plaintiffs' case raised a *prima facie* case with probability of success and that unless the injunction is issued the damage to be suffered by the plaintiff is of irreparable nature. But whenever the

Court is in some doubt it will resolve the issue on the balance of convenience.

I will now deal with the evidential aspects only insofar as they are pertinent to the issues raised by the chamber summons.

In paragraph 6 of the plaintiff affidavit filed in support of the chamber summons it is averred that the defendants have never held an annual general meeting for several years. In this regard I was referred to rule 4(a) of the Union's Constitution which provides:

"The annual conference shall be the supreme authority of the Union and shall be held every year during the month of July, at such time or place as may be decided upon by the executive committee."

It can not therefore be disputed that the requirement to hold the annual conference is both mandatory and fundamental. Under rule 4(d) it is the annual conference which lays down the policy of the Union and gives the directions regarding the organisation of the Union.

Although the 2nd defendant swore and filed two affidavits in this application he neither controverted plaintiffs' allegation nor did he offer an explanation of circumstances which may have militated against the holding of the same (annual conference).

It would thus become right to say that the plaintiff allegations that he and his committee have usurped the functions of the annual general meeting and are running the Union unconstitutionally are not at all without foundation; they are ones which could easily be substantiated at the trial.

With regard to the special conference which was purportedly held on the 29th December 1993 and during which the rule in respect of membership and monthly subscription fees was amended, the plaintiffs have alleged that rules 5(c) of the Constitution which requires that there be a written 7 days' notice before the date of the conference was never adhered to. In the course of his submissions Mr Ochuka said:

"We concede that there was no notice as required by rule 5(c) in that the notice for 7 days was not given. A notice was given a day before the special conference."

Again, there was no justification for this deliberate contravention of the constitutional rule. It is pertinent to note that rule 5(c) which was contravened is also a mandatory one. The plaintiffs content that the special conference was thus held irregularly and its deliberations lack the binding effect on its members. Because the requisite notice was not given the purported amendment of the rule 3(ii) which relates to the rate of members' subscriptions could not have proceeded under rule 17 which provides:

"...all proposal for amendments shall be submitted to

the General Secretary not later than two weeks before the date of such annual conference and not later than 4 days before a special conference."

Nor was the amendment of rule 3(ii) included in the agenda which was to be discussed at the special conference. Further, it is clear that the amendment was not preceded by a secret ballot as required by rule 17.

Upon the foregoing it is plain that the defendants have inexcusably flouted nearly every crucial rule in the Constitution of the Union. They could only be doing so with an ulterior motive. When they were

required to show the assets and income of the Union they created an impression in their affidavit that its sole source of income was the members' subscriptions. But in the plaintiffs' affidavit it was proved that additionally there is rent income and 6 other sources. Mrs Khaminwa submitted that this non-disclosure is a pointer to the fact that the defendant's are wasting the assets and income of the union and the Court should restrain them from doing so. But it was shown that the funds are managed by a board of trustees who are not a party to this suit.

It has however become evident that the Union has 20 employees whose wages and other emoluments are paid out of the Union's funds. These employees would obviously be adversely affected and would suffer loss and gross inconvenience if a ban on the expenditure of the Union funds was imposed. I agree with Mr Ochuka that such order would only paralyse the operations of the Union. This can be avoided by restricting the Union's monthly expenditure to Shs 64,000/- as shown in the defendants supplementary affidavit.

In the ultimate analysis I uphold the plaintiffs' submissions in the application I make the following orders:

(a) The defendant expenditures of the funds of the Union shall not exceed Shs 64,000/- per month until the case main suit is heard and determined. In order to ensure that this order is obeyed the defendant shall file in Court monthly returns of their income and expenditure.

(b) An injunction restraining the enforcement of the amended rule 3(11) of the Constitution is granted. It follows that the recovery of the raised subscriptions shall be suspended forthwith pending the determination of suit.

This is a case where the members of the committee have evidently fallen

from grace and conducted the affairs of the Union in an unmitigated disregard of the rules. They should not have defended this obvious application.

So I order defendants in No 2 to No 6 do personally pay the plaintiffs' taxed costs of this application forthwith.

Those are the orders of this Court.

Dated and Delivered at Mombasa this 2nd day of June 1994.

I.C.C.WAMBILYANGAH

JUDGE



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