



**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW  
BY WAY OF ORDERS OF MANDAMUS**

**AND**

**IN THE MATTER OF THE LABOUR RELATIONS ACT NO. 14 OF 2007**

**AND**

**IN THE MATTER OF REGISTRATION OF TRADE UNIONS**

**BETWEEN**

**JAPHETH A AGURA BEING THE INTERIM SECRETARY**

**GENERAL AND PROMOTER OF KENYA UNION OF EMPLOYEES**

**OF POLYTECHNICS COLLEGES & ALLIED INSTITUTION.....1<sup>ST</sup> APPLICANT**

**AND**

**TRIZA A OMOLLO, BEING THE INTERIM SECRETARY**

**GENERAL & PROMOTER OF COSMETOLOGY AND**

**ALLIED WORKERS UNION (K).....2<sup>ND</sup> APPLICANT**

**AND**

**HENRY O NYUMBA, BEING THE INTERIM**

**SECRETARY GENERAL AND PROMOTER OF**

**RETAIL & WHOLESALE WORKERS, UNION (K) .....3<sup>RD</sup> APPLICANT**

**VERSUS**

**THE REGISTRAR OF TRADE UNIONS .....RESPONDENT**

**JUDGEMENT**

Through a chamber summons dated 24<sup>th</sup> August, 2010 Japeth A Agura, Triza A Omollo and Henry O Nyumba who are the ex-parte applicants in this cause obtained the leave of this court to commence judicial review proceedings. The said application for leave was supported by the grounds on its face, a statement dated 23<sup>rd</sup> August, 2010, a verifying affidavit sworn on 23<sup>rd</sup> August, 2010 by the 1<sup>st</sup> ex-parte applicant Japeth Anyira Agura plus documents annexed to the verifying affidavit.

As a consequence of the said leave the ex-parte applicants filed a notice of motion on 20<sup>th</sup> September, 2010 in which their main prayer is for the issuance of an Order of Mandamus directed at the Registrar of Trade Unions (the respondent):

**“compelling him to grant full “REGISTRATION” of :-**

- (a) Kenya Union of Employees of Polytechnics, Colleges and Allied Institutions;**
- (b) Cosmetology and Allied Workers Union-Kenya; and**
- (c) Retail and Wholesale Workers Union- Kenya.”**

The respondent did not file any response to this application. I will therefore proceed to make my decision on the evidence placed before me.

The facts placed before the court by the ex-parte applicants reveal that Japeth A Agura, Triza A Omollo and Henry O Nyumba are the interim general secretaries and promoters of Kenya Union of Employees of Polytechnics, Colleges and Allied Institutions; Cosmetology and Allied Workers Union (K) and Retail and Wholesale Workers Union (K) respectively. All the three proposed unions made applications to the respondent for certificates of establishment and registration in accordance with the requirements of the Labour Relations Act, 2007. The unions were issued with certificates of establishment but the respondent has failed to register the applicant trade unions. The applicants now ask this court to direct the respondent to register the proposed trade unions in accordance with Section 19 of the Labour Relations Act, 2007.

The verifying affidavit in support of the application gives a chronology of the events that have taken place in relation to the applications for registration. I will reproduce paragraphs 16 to 20 of the said verifying affidavit for the purposes of this judgement. They read as follows:-

**“16. THAT the Applicants have made numerous pleas and requests to the Registrar of Trade Unions to effect Registration as per the guidelines stipulated under the Labour Relations Act to no avail.**

**17. THAT the Registrar of Trade Unions did write to the Labour Commissioner and Secretary to the Labour Board concerning the delayed registration of the applicants’ and those of 8 other Applicant Trade Unions. Attached hereto and marked “JAA 6” is the copy of the letter dated 24<sup>th</sup> February, 2009.**

**18. THAT we are not aware if the Applicant (Respondent?) has got any response in regard to the said letter.**

**19. THAT the Applicants aver that the Registrar of Trade Unions is duly satisfied that the applicants have met the requirements of the Labour Relations Act and ought by now to have issued registration to the applicants as provided for by Section 19 of the Labour Relations Act No. 14 of 2007 Laws of Kenya.**

**20. THAT the Applicants herein aver that the registration of the applicants solely lies within the jurisdiction of the Registrar of Trade Unions.”**

Looking at the reproduced contents of the replying affidavit it is clear that the applicants are saying that

they have met the conditions for registration and that the respondent is satisfied that they have met the conditions for registration and that the mandate for registering the applicants trade unions lies with the respondent and nobody else.

The applicants urged this court to be persuaded and guided by the decisions in **ELIJAH MUSEMBEI & 6 OTHERS VS. THE REGISTRAR OF TRADE UNIONS, NAIROBI H.C.C.C NO. 10 OF 1999; BANKING INSURANCE & FINANCE UNION (KENYA) VS. KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERS, CIVIL APPEAL NO. 60 OF 1988; AND REPUBLIC VS. THE REGISTRAR OF TRADE UNIONS EX-PARTE THE BANKING INSURANCE AND FINANCE UNION (KENYA)** in arriving at its decision.

I have looked at the authorities cited by the applicants. With great respect to the learned counsel for the applicants I must say that those decisions are not relevant in this case. Those authorities dealt with situations where the Registrar of Trade Unions had already made decisions and the decisions were being challenged in court. In the case before me the Registrar of Trade Unions (respondent) has not made any decision. I am therefore being asked to compel the respondent to make a particular decision.

In his submissions, counsel for the applicant cited the now well-known Court of Appeal decision in **KENYA NATIONAL EXAMINATION COUNCIL VS. REPUBLIC EX-PARTE GEOFFREY GATHENJI NJOROGE AND 9 OTHERS (1997) eKLR**. In relation to this case the relevant part of that judgement is where the Court talked about orders of mandamus. The Court first quoted Halsbury's Laws of England, 4<sup>th</sup> Edition Volume 1 at Page 111 as follows:-

**“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed at any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”**

The Court went ahead, to quote what the treatise says about the scope of an order of mandamus, as follows:-

**“The order must command no more than the party against whom the application made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried in a specific way.”**

The Court proceeded to render its views on the Order of Mandamus in the following words:-

**“What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or a body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.”**

In my understanding an Order of Mandamus cannot issue to a public officer compelling the officer to perform a duty in a specific way when that public officer has discretion on the performance of the duty. In the case before me, Part III i.e. Sections 12-30 of the Labour Relations Act, Chapter 14 of 2007 empowers the respondent to register a trade union or not to register a trade union for reasons specified in the Act. This court cannot therefore issue an order directing the respondent to register the applicant trade unions. It is said that the respondent had failed to make a decision for over three years. The much this court could have done if the correct prayer had been placed before it was to compel the respondent to make a decision. Even if the correct prayer had been made it would not have been possible for this court

to direct the respondent to make a decision since the respondent can only register a trade union after consultation with the National Labour Board (see Section 19 of the Labour Relations Act). The registration of a trade union is therefore not in the hands of the respondent alone as submitted by the applicants. The respondent did his part when he wrote the letter dated 24<sup>th</sup> February, 2009 to the Labour Commissioner and Secretary of the National Labour Board asking for a decision to be made in respect of the registration of the applicant trade unions and other trade unions.

It is unfortunate that the National Labour Board has taken long to make a decision on the applicants' application for registration. That indecision cannot, however, be blamed on the respondent who is only but a member of the National Labour Board (section 6(1) of the Labour Institutions Act refers). The failure by the National Labour Board to act contravenes the national values and principles of governance found in Article 10 of the Constitution. The National Labour Board is however not a party to these proceedings and not much can be said about its inaction.

In the circumstances of this case the only logical conclusion is that the application should fail. It is therefore dismissed. Since the application was not defended, I make no order as to costs.

Dated and signed at Nairobi this 29th day of February, 2012 .

**W.K. KORIR**

**JUDGE**