



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)**

**MISC CIV APPLI 541 OF 2007**

**IN THE MATTER OF THE TRADE UNIONS ACT CHAPTER 233 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE APPLICATION FOR REGISTRATION OF POSTMAIL AND  
COURIER WORKERS UNION**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

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

**EX-PARTE**

- 1. HOLLIAB LODENYO**
- 2. ELIJAH OMAE**
- 3. KEPHER ODONGO**
- 4. SHEILA CHESIRE**
- 5. LILIAN LESINGO**
- 6. CHARLES GESORA**
- 7. SOPHIA MWASHI**

**JUDGMENT**

In the application dated 28<sup>th</sup> May 2007 the applicants seek two orders of mandamus as follows:

- (a) An order of mandamus compelling the Registrar of Trade Unions to consider the application for registration of the Post Mail and Courier Workers Union in accordance with the Trade Unions Act

(b) An order of Mandamus compelling the Registrar of Trade Union to enter the Post Mail and Courier Workers Union into the Register of Trade Unions and to issue it with a certificate of registration or exemption from registration in accordance with the Trade Unions Act.

The factual background is that on 18<sup>th</sup> May 2006 the applicants submitted an application for the registration of a Trade Union in name and style of the Post Mail and Courier Workers Union. The application was duly received and the registration fee of Kshs 15,000/- paid vide receipt No S 55396L dated 19<sup>th</sup> May 2006. On 25<sup>th</sup> January 2007 the Registrar of Trade Unions wrote to the Interim Secretary General of the Union stating that the registration had been refused under the provisions of section 16 of the Trade Union Act Cap 237 of Laws of Kenya. The cited ground for refusal was that there already exists a Trade Union, the Communications Workers Union of Kenya which sufficiently represents a substantial interest which the intended union seeks to represent.

The applicant claims that it is incorrect that the Communications Workers Union of Kenya does represent the interests which the intended Union seeks to represent. It also contends that the Registrar did not consult with the other bodies or persons he was expected to consult and that the applicants were never given an opportunity to explain their position or shown the responses from the consulted bodies or persons.

Finally it is claimed that the Registrar has in the past as regards similarly placed new Unions with other Umbrella Unions, registered new Unions and in this case he is discriminating in not treating like cases alike and for this reason, the decision is unreasonable. The challenge ends by asserting that the Registrar in arriving at the decision he did take into account irrelevant considerations and that this is also a valid ground for this courts exercise of its judicial review jurisdiction and further that such intervention is necessary to protect the legitimate expectations of the applicant.

I have considered the skeleton arguments filed by both parties as has been the practice in constitutional and judicial review matters.

My finding is that this application is misconceived and incompetent in that it purports to seek orders of mandamus in a situation where the decision maker has as admitted exercised the statutory power as set out in s 16 of the Trade Union Act. The challenge is also aimed at attacking the merit of the decision which is not the function of a judicial review court except where perhaps a decision is being attacked as *Wednesbury* unreasonable. On the facts the decision is based on s 16 and is not *Wednesbury* unreasonable. The incompetency of the application is apparent in that there is no challenge at all as regards the decision itself in that an order of certiorari to quash the offending decision has not been sought at all. Perhaps it is vital to remind the applicants that in situations such as presented by the facts of this case, a mandamus order cannot survive on its own because in most situations of judicial review intervention the court quashes the challenged decisions so that the decision makers, may if they so wish, remake the decisions in accordance with the law. Courts do not take over the decision making. The decision not to register the Union having been made, there is no failure to perform a statutory duty to warrant the grant of a mandamus orders.

The respondent has factually not failed to perform a public duty. The public duty the Registrar has under S 16 of the Trade Unions Act is to make a decision either rejecting the application to register or approving the application. Having made the decision to reject, a mandamus order cannot lie to compel him to perform the public duty in a particular way. And in the circumstances of this case to compel him to register the applicants Union is to usurp the powers of the registrar. A Mandamus order does not attack a decision, it is certiorari (which was not sought by the applicant) which quashes the decision and mandamus compels the performance of a public duty. The application is therefore patently incompetent.

The application is dismissed with costs to the respondent.

DATED and delivered at Nairobi this 14<sup>th</sup> day of December, 2007.

**J G NYAMU**

## **JUDGE**

### **Advocates**

Mr Ochieng Omondi for the Applicants

Mr W.K. Langat for the Respondents