



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT**

**NAIROBI**

**CIVIL APPEAL NO.40 OF 2020**

**DANIEL NDUNG’U**

**EVELYN CATHERU (suing for andas interim officials of the proposed**

**KENYA ORGANISATION OF SECONDARY SCHOOLS BOARDS OF**

**MANAGEMENT) .....APPELLANTS**

**VERSUS**

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

**JUDGEMENT**

The appeal is made following the decision of the respondent on 18<sup>th</sup> February, 2020 and being aggrieved lodged the instant appeal on the grounds that;

1. *The respondent erred in law and in fact in rejecting the registration of the proposed Employers’ Organisation.*
2. *The respondent erred in law and in fact by failing to consider that the registration of the proposed Employers’ Organisation was necessitated by the various employment cases filed by employees of the proposed membership.*
3. *The registrar erred by failing to take cognisance of the fact that the proposed membership were mandated under the law to employ recruit and remunerate non-teaching staff and should therefore be recognised as employers.*
4. *The registrar erred by failing to take cognisance of the fact that the proposed membership were mandated under the law to employ, recruit, remunerate and discipline teachers not employed by TSC on a temporary basis and should therefore be recognised as employers.*
5. *The registrar erred in law and in fact by erroneously interpreting the term employer as defined by the Labour Relations Act and failed to consider the Basic Education Act and other relevant laws.*
6. *The registrar erred in law and in fact by erroneously interpreting the term employers’ organisation as defined by the Labour Relations Act.*
7. *The registrar erred in law and in fact by stating that there was no nexus between boards of different schools and by failing to take cognisance of the fact that functions and duties of the boards are as per section 55(p) of the Basic Education Act are general and cut across all boards of all public schools.*
8. *The registrar erred in law and in fact by failing to take cognisance of the fact that the proposed employers’ organisation will work with the government to promote better working relations with the employees of public schools.*
9. *The registrar erred in law and in fact by failing to take cognisance of the fact that the proposed employers’ organisation will work with the government to promote infrastructural development.*
10. *The registrar erred in law and in fact by failing to take cognisance of the fact that the proposed employers’ organisation will work with government and other agencies to streamline and regulate operations and remuneration of all non-teaching staff and*

*teachers employed by schools boards of management to avoid frequent litigation exhibited when various boards work independently.*

*11. The registrar erred in law and in fact by failing to take cognisance of the fact that employees of the boards are represented by their trade unions and it would therefore be only fair that the boards are also given one voice as well by allowing them to register their own employers' organisation.*

*12. The registrar erred in law and in fact by failing to take cognisance of the fact that the proposed employers' organisation will work with the government and other agencies to speak with one voice to mitigate the challenges faced when unions call their members to strike.*

*13. The registrar erred in law and in fact by failing to take cognisance of the fact that the proposed employers' organisation will work with the government to promote education standards in the country.*

*14. The registrar erred in law and in fact by failing to take cognisance of the fact that the proposed employers' organisation will work with the government to create synergy for innovation in order to reduce over-reliance of schools in government funding and creating alternative source of income to help run school operations.*

*15. The registrar erred in law and in fact by failing to take cognisance of the fact that the proposed employers' organisation will work with the government to promote corporate social responsibility by providing scholarships to needy students.*

*16. The registrar by failing and/or effusing to register the proposed employers' organisation is denying the appellants their employees and other potential members the right to enter into collective bargaining agreement.*

*17. The registrar erred by failing to recognise that although membership to Boards of management of public secondary schools is temporary, no school can run without a board of management and the fact that the post of the secretary held by the principal is permanent and the boards are de facto permanent.*

*18. The denial of registration is an affront to Articles 36, 41 of the Constitution and Section 14 (d) (i) of the Labour Relations Act.*

On the grounds set out above, the appellants seek that the appeal be allowed and the respondent be compelled to register the Kenya Organisation of Secondary Schools Boards of Management as an employers' organisation and costs be paid for the appeal.

In reply to the appeal, the respondent filed the Replying Affidavit of E. N. Gicheha the Registrar of Trade Unions and who avers that the mandate of the office is to register trade unions, employer organisations and federations.

The appellants applied for registration of the proposed Kenya Organisation of Secondary Schools Boards of Management as an employers' organisation and the application was refused on the grounds that the applicant is not a legal entity capable of negotiating collective bargaining agreement (CBA) with employees union and lacked corporate status and the boards of management of secondary schools are temporary in nature and are positions held where members are appointed from diverse backgrounds and have no common denominator.

The respondent also avers that the appellants application went through all the legal procedures under the Labour Relations Act (the LRA) and w which included advice from the National Labour Board and in this regard, the appellant is not a legal entity and recruitment function they seek to undertake is a legal function of the Teachers Service Commissions (TSC) delegated to the boards as its agents in schools. The non-teaching staff are recruited by schools through the boards and are not employees of the boards who have no physical offices in schools or a salary and only attend meetings, their role is advisory and do not receive returns as required under normal recruitment.

The respondent also avers that the appellants had earlier applied for registration as Association of Public Service Employers which was later changed to Federation of School Employers and later changed to Association of Schools Boards of Management and that the appellants do not seem to know what they exactly want registered.

Under Article 5 of the proposed constitution provides for membership from boards of management of secondary schools (Public or private) which are corporate bodies and any other body which can be approved by the union save any other body is unknown.

The board of management of secondary schools do not have corporate status and only help school management to run schools and the responsibility to pay non-teaching staff remains with the school.

The respondent also avers that an employer is defined under the LRA and the appellants do not fall under any of the stated categories as it is a non-person, public body, firm, corporation or company and as such the appeal lacks merit and should be dismissed with costs.

The role of the respondent is legal and cannot be condemned to pay costs.

Both parties agreed and addressed the appeal by way of written submissions.

The appellants submitted that on 4<sup>th</sup> October, 2017 they made application to the respondent for registration of an association of *Association of Public Service Employers* with mandate to represent independent commission employers, county government employers, schools boards of management as employers and other public employers who may wish to join.

On 16<sup>th</sup> October, 2017 the respondent replied and advised that an organisation representing county government employers already existed

and the appellants decided to amend the name and scope of representation to *Federation of School employers* which would cover boards of management of schools but this was rejected by the respondent on the grounds that such name would cause confusion.

By letter dated 9<sup>th</sup> November, 2017 the appellants amended the name to *Association of Schools Boards of Management* and on 14<sup>th</sup> November, 2017 the respondent issued certificate under section 12 of the LRA which allowed the appellants to undertake lawful activities to establish the employers' organisation as required under the law.

The application was gazetted on 29<sup>th</sup> March, 2018 under **Gazette Notice No.3069** and on the print media on 13<sup>th</sup> April, 2018 and after a year made application to the respondent without respondent. The appellants wrote to the Commission on Administration of Justice on the delay in response and by letter dated 17<sup>th</sup> May, 2019 the respondent noted that the name *association* should not be included as *associations* are registered under the Societies Act and the scope of representation under the constitution was vague and required clarification.

The appellants amended the name to *Kenya Organisation of Schools Boards of Management* and to justify the need for such organisation they cited several cases where boards of management of several schools have been sued by employees but on 20<sup>th</sup> February, 2020 the respondent refused registration for reasons that boards of management are not legal entities of negotiating CBAs with employees and are temporary. However, the respondent appreciated that the boards of management had functions of recruitment, employment and remuneration of non-teaching staff.

The appellants submitted that they were aggrieved by the decision of the respondent and thus this appeal and on the grounds that the decision of the respondent is an affront to section 14(d) (i) of the LRA and Article 41 of the constitution and invite the court to determine whether board of management qualify as employers capable of forming an employer organisation and thus negotiate CBAs with employees and whether the respondent in rejecting the application was lawful.

An employer is defined under section 2 of the Employment act and boards of management of secondary schools are established under section 55(c) of the Basic Education Act and although its membership is temporary, such boards have the function of administration of resources, to recruit, employ and remunerate the non-teaching staff.

As employers, boards of management can be registered as applied for in this case. There exists the *Kenya Union of Secondary Schools Non-Teaching Staff* which was registered by the respondent on 24<sup>th</sup> May, 2017 and there exists the *Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA)* which was registered by the respondent.

The appellants submitted that the recruitment of non-teaching staff is a function delegated to boards by the TSC pursuant to section 4(a) of the TSC Act which has mandate to employ, recruit and deploy registered teacher. Boards employ non-teaching staff like bursars, cooks, technicians, drivers, cleaners as mandated under section 59 of the Basic Education Act. This is a proper definition of an 'employer' under the law.

Boards of management of secondary schools have been sued severally by employees through various trade unions representing their interests which have not been the case for employers. The refusal for registration on the grounds that the applicant is not a legal entity capable of negotiating CBA is misleading since boards are recognised employers of non-teaching staff within schools. They also employ teachers on temporary basis and in an employer capacity have been sued with valid orders issuing and as such, the appellants appeal should be allowed and the respondent directed to register the Kenya Organisation of Secondary Schools Board of Management.

The respondent submitted that the application of the appellant for registration of the proposed Secondary Schools Boards of Management as an employers' organisation was refused vide notice dated 18<sup>th</sup> February, 2020 and reasons for refusal given. The appellants are not a legal entity capable of negotiating CBAs with respective worker's unions and boards of management of secondary schools are temporary where members are appointed from divers groups with no common denominator.

The appellants filed an appeal challenging the decision of the respondent based on the provisions of Article 41 of the Constitution and section 14(d) (i) of the LRA but any matter challenging the provisions and application of the constitution ought to be filed under a constitutional petition and not an appeal as held in the case of **Anarita Karimi Njeru v Republic [1979] KLR** and the case of **Mercy Nduta Mwangi t/a Mwangi Kangara & Co. Advocates v invesco Assurance Company Limited [2019] eKLR**. The matter before court is not proper and should be dismissed.

The respondent also submitted that there was no error of fact or law in the application of the LRA. The recruitment of non-teaching staff is a function delegated to the boards of management by the TSC and thus acts as agents. Non-teaching staff are recruited by schools through the board and the appellants purporting to represent the boards as the alleged employees of non-teaching staff in schools who are represented by KUDHEIHA pursuant to section 14(d) (i) as a trade union thus exists for these category of employees.

The definition of an 'employer' under section 2 of the LRA is properly applied by the respondent and as stated in the notice of refusal to register the appellants and noting several applications filed, there is no clarity as to the nature of organisation they should register.

The respondent is acting within the legal mandate of the office and should not be penalised in costs should be discretionary.

Determination

The issues which emerge for determination in this appeal are;

Whether the appeal is properly before this court;

) Whether the grounds advanced by the respondent to refuse registration of the appellant are valid and reasonable;

Who should pay costs.

The appeal herein relates to the decision of the respondent and refusal to register the appellants proposed Kenya Organisation of Secondary Schools Board of Management vide letter dated 18<sup>th</sup> February, 2020.

This follows an application for registration lodged by the appellants and dated 9<sup>th</sup> November, 2017 as amended and pursuant to which a certificate issued under the provisions of section 12 LRA allowing the appellants to undertake lawful activities to establish an employers' organisation as applied for. A notice also issued under Gazette Notice No.3069 of 29<sup>th</sup> March, 2018.

With regard to the first issue for determination, it is trite that any party aggrieved by the decision of the Registrar of Trade Unions should lodge an appeal with the court. Section 30 of the LRA requires that;

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

It is common cause that the instant appeal arose from the decision of the respondent, the Registrar of Trade Unions. Save to urge the appeal under the provisions of Article 41 of the constitution, this is the proper forum for the appellants to urge their appeal.

The legal foundation of the appeal is proper.

However, the decision challenged is dated 18<sup>th</sup> February, 2020 and the appeal was filed on 18<sup>th</sup> June, 2020 whereas section 30 requires an appeal be filed within 30 days from the date the impugned decision was made.

The appellants have since obtained leave to file the appeal out of time vide **Misc. Application No.51 of 2020**. Such leave was granted.

The instant appeal is properly before this court.

With regard to the refusal for registration of the proposed employers' organisation by the respondent, the appellants' case is that there is need for registration of Kenya Organisation of Schools Boards of Management since there are several cases where boards of management of several secondary schools have been sued severally by employees. That the functions of boards includes recruitment, employment and remuneration of non-teaching staff and which requires the boards to have an organisation to represent them in any dispute that may arise as a result of its functions and negotiations for CBAs.

The respondent refused registration and gave the reasons that the appellants/proposed employers' organisation is not a legal entity capable of negotiating CBAs and it lacked corporate status and that board of management of secondary schools are temporary positions where members are appointed from diverse groups and they have no common denominator. That the recruitment function of boards of management is a delegated function by TSC for and on behalf of schools. The proposed employers' organisation constitution provides for membership from boards of management of secondary schools which are corporate bodies and can be approved by the unions but such boards are not such corporates and only act as advisory to schools.

In this regard, Section 15 of the LRA regulates the registration of employers' organisations;

*15. Requirements for registering employers' organisation*

*(1) An employers' organisation may apply for registration if—*

*(a) the employers' organisation has applied for registration in accordance with the requirements of this Act;*

*(b) the employers' organisation has adopted a constitution which complies with the requirements of this Act, including the requirements of the First Schedule;*

*(c) ...*

*(d) ...*

*(e) subject to subsection (2), the constitution of the employers' organisation specifies that only employers within a specified sector qualify for membership;*

*(f) the name of the employers' organisation is not the same as that of an existing employers' organisation or sufficiently similar so as to mislead or cause confusion;*

*(g) the decision to register was taken at a meeting attended by at least four members;*

*(h) the employers' organisation is independent from the control, either directly or indirectly of any trade union or*

federation of trade unions;

(i) the employers' organisation's primary purpose is to conduct the activities of an employer's organisation.

**(2) Notwithstanding the provisions of subsection (1)(c), the Registrar may register an employers' organisation consisting of employers in more than one sector, if the Registrar is satisfied that the constitution contains suitable provision to protect and promote the respective sectoral interests of employers.** the respondent with the legal mandate to register an employers' organisation is therefore required to interrogate every application presented and ascertain that the legal threshold has been achieved. An employers' organisation must represent a specific sector not represented by any other employers' organisation and have a constitution to protect and promote the respective sectoral interests of the employers.

In the constitution, the appellants define the proposed employers' organisation as one with the objectives of *to provide machinery for collective negotiation of rates and scales of wages and conditions of service within their areas of jurisdiction, to initiate promote and co-ordinate matters of general interest appertaining thereto ...*

The outlined objectives relates to the role assigned to an employer under the law as defined under section 2 of the LRA and the Employment Act, 2007.

And 'employers' organisation is defined under the LRA as follows;

**"employers' organisation" means any number of employers associated together for the purpose, whether by itself or with other purposes, of regulating relations between employers and their employees or the trade unions representing those employees;**

In this regards, the LRA also defines an 'employer' to mean;

**"Employer" means any person, public body, firm, corporation or company, who or which has entered into a contract of service to employ any individual, and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company;**

The common thread here being 'employer' who then, in order to form an employers' organisation must be a public body, firm, corporation or company, who or which has entered into a contract of service to employ any individual.

The entity of 'employers' organisation' is therefore the conglomerate of a **number of employers associated together for the purpose** and to secure mutual interests with employees or their trade union. Such 'employers' then must as of course be possessed of 'employees' who in securing their employment interests may do so individually or through a trade union.

Such entails the balance of industrial peace at the shop floor.

The proposed employers' organisation by the appellants is neither defined as an employer or employee. It is not a public body, firm, corporation or company with any known interest at the shop floor so as to be registered as proposed employers' organisation with the respondent and whose mandate is strictly defined under the LRA.

Under the definition the appellants have assigned to the proposed employers' organisation, the 'employer' threshold s being a public body, firm, corporation or company which has entered to a contract of service with any person is lacking.

The recruited members and officials of the proposed employers' organisation are all teachers and none is stated to belong to any board of management of a secondary school. the appellants do not demonstrate that they belong to any board of management of any secondary school, they are not an employer as a public body, firm, corporation or company so as to have the requisite legal status to commence the procedural requirements for an employers' organisation pursuant to section 15 of the LRA read together with Article 41 of the Constitution.

On this basis the Court finds the refusal by the respondent to register the appellants proposed employers' organisation is justified and reasonable in the circumstances of this case as the interest to be addressed the proposed Kenya Organisation of Secondary Schools Board of Management is not by a known public body, firm, corporation of company as clearly defined under the LRA under which the respondent is bound.

On the issue of costs, such costs with regard to matters before this court are awarded upon the discretion of the court. The appellants having received sound advice from the respondent, costs are due to the respondent.

**Accordingly, the appeal herein is found without merits in its entirety and is hereby dismissed. Costs to the respondent.**

**DELIVERED IN COURT AT NAIROBI THIS 7TH DAY OF OCTOBER, 2021.**

**M. MBARU**

**JUDGE**