



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW 204 OF 2011

REPUBLIC.....
.....APPLICANT

-VERSUS-

REGISTRAR OF TRADE UNIONS.....
.....1STRESPONDENT

**THE SECRETARY, SELECTION PANNEL FOR THE APPOINTMENT OF
MEMBERS OF THE SALARIES AND
REMUNERATIONCOMMISSION.....**
.....2NDRESPONDENT

THE HON. ATTORNEY GENERAL.....
.....3RDRESPONDENT

**AND
CENTRAL ORGANIZATION OF**

TRADE UNIONS (COTU).....
.....INTERESTED PARTY

EXPARTE

WILLIAM OCHIENG OGOLLA

LEONARD RUFUS OCHIENG

ANNE KEERI MULI

J U D G M E N T

The three Exparte Applicants herein namely William Ochieng Ogolla, Leonard Rufus Ochieng and Ann Keeru Muli (*hereinafter referred to as the 1st, 2nd & 3rd Applicants respectively or collectively as the Applicants*) moved this court by way of Notice of Motion filed on 30th August 2011 seeking the following Orders:

- (1) An Order of mandamus to compel the 1st Respondent, the Registrar of Trade Unions to act on the application for registration of the Federation of Public Service Trade Unions of Kenya (PUSETU-K) pending before him since 7th January 2011.

(2) An order of prohibition directed at the Respondents and their principals prohibiting them from receiving and acting upon any name nominated by the interested party herein, Central Organization of Trade Unions (COTU- K) in filling the position of a member from an Umbrella trade union for Civil Servants in the salaries and Remuneration Commission.

(3) Costs of this application be provided for.

The application was filed pursuant to leave granted on 26th August 2011 and is supported by the statutory statement dated 22nd August 2011 and the verifying affidavits sworn by the three Applicants on even date and the further affidavit sworn by the 1st Applicant on 25th January 2012 and annexures thereto.

The three Respondents namely; The Registrar of Trade Unions, the Secretary, Selection Panel for Appointment of Members of the Salaries and Remuneration Commission and the Attorney General as well as the Interested Party, the Central Organization of Trade Unions (COTU) opposed the motion.

The 1st Respondent filed a replying affidavit sworn by William Kibet Langat on 19th September 2011 while Mr. Titus M. Ndambuki, the Permanent Secretary to the Office of the Prime Minister, Ministry of State for Public Service swore a replying affidavit on behalf of the 2nd Respondent which was filed on 3rd October 2011.

Mr. Francis Atwoli, the National Secretary General of COTU swore a replying affidavit on behalf of the Interested Party which was filed in court on 22nd September 2011.

The court record shows that while the Notice of Motion was pending hearing, Prayer No.2 for an order of Prohibition directed at the Respondents' and their principals was overtaken by events when the Interested Party's nominee was accepted and gazetted as a member of the Salaries and Remuneration Commission forcing the Applicants to abandon that particular prayer.

This position was clearly communicated to the court on 28th May 2012 by Mr. Nyadieka, learned Counsel for the Applicants who confirmed that the Applicants had abandoned the prayer for an order of prohibition and were only pursuing the prayer for an order of mandamus in terms of Prayer 1 besides the Prayer to be awarded costs of the suit.

In view of the above, this judgment will be restricted to the two prayers only.

Briefly, the Applicants' case is that they are members of trade unions representing concerns in the Public Service namely; the Union of Kenya Civil Servants (U.K.S.C.), the Kenya National Union of Teachers (KNUT), the Kenya Union of Post Primary Teachers (KUPPET), The Universities Non-Teaching Staff Union (UNTESU) and the University Academic Staff Union (UASU) which resolved to constitute themselves into a federation to be known as the Federation of Public Service Trade Unions of Kenya (*hereinafter referred to as PUSETU*).

On 16th December 2010, an application in the prescribed form was made for the Registration of the proposed federation to the Registrar of Trade Unions as required under the Labour Relations Act of 2007. The said application was followed by a letter dated 22nd December 2010 which forwarded documents to the 1st Respondent required for registration of the said confederation.

It is the Applicants' case that since 7th January 2011 when the 1st

Respondent acknowledged receipt of their application to the time of filing the instant proceedings, the 1st Respondent had refused to act on their application despite making personal visits to his office and making constant enquiries regarding the status of their application.

The Applicants contend that the 1st Respondent's refusal to act on their application amounts to failure to perform a public duty imposed by Section 12 – 20 of the Labour Relations Act. The Applicants now urge the court to issue an order of mandamus directed at the 1st Respondent to compel him to act on their application for registration of the federation of their trade unions as required by the law.

Mr. William Kibet Langat who is currently occupying the Office of the 1st Respondent in his replying affidavit sworn on 19th September 2011 admitted having received the Applicants' application for registration of a confederation on 7th January 2011 but denied having refused to act on it.

He deponed in Paragraph 5 - 11 of his affidavit that in matters of registration of Trade Unions, Employers Organizations and Federations, he was required under the Labour Relations Act and the Labour Institutions Act to consult and act on the advice of the National Labour Board (**hereinafter referred to as the Board**). He further deponed that as a matter of law, the Board was supposed to meet quarterly and that it had met three times since January 2011 the last meeting being on 30th August 2011 when the applicants' application was scheduled to be considered but could not be so considered as the matter had by then become subjudice as the instant proceedings had already been filed.

The 1st Respondent averred that he had acted fairly within the law and without malice. The 1st Respondent appeared to be implying that his failure to act was occasioned by the Boards failure to advise him on whether or not to register the proposed federation.

Having gone through the replying affidavits filed on behalf of the 2nd, 3rd Respondents and the Interested Party, I find that the depositions therein were made in answer to the Applicants' prayer for an order of Prohibition which no longer concerns the court in this case as it has already been abandoned by the applicant. I however note that the Interested Party has by implication raised the issue of jurisdiction of this court to entertain the Applicants' motion claiming that the Applicants ought to have moved the Industrial Court under Section 12 of the Labour Institutions Act and Section 10 of the Industrial Court Act 2011 and not this court.

To further advance their respective positions, the parties filed written submissions which they highlighted before me on 28th May 2012.

I have carefully considered the pleadings herein and the submissions made by the 1st Respondent in person and Counsel representing the Applicants, 2nd, 3rd Respondents and the Interested Party.

However, before analyzing the said submissions or considering the merits or otherwise of the Applicants' Notice of Motion, I propose to first deal with the issue of jurisdiction raised by the Interested Party because jurisdiction is everything. Once there is a challenge on jurisdiction, ascertainment of jurisdiction is the first thing a court must do before dealing with any issues raised in any dispute before it because if the court establishes that it has no jurisdiction to entertain or hear a dispute before it for determination, it cannot take any further step. Jurisdiction is what gives the court power to determine a dispute and without it, the court has no option but to down its tools.

That is why the issue of jurisdiction must be determined first before dealing with the other contentions raised by the parties herein.

In respect of the issue of jurisdiction, Mrs. Guserwa, learned Counsel for the Interested Party submitted that if the Applicants were of the view that their right to form a confederation had been violated, they should have approached the Industrial Court not this court since Parliament had given specific jurisdiction to the Industrial Court to deal with all matters related to Labour relations which included matters of refusing to register a trade union or federation. She relied on Section 12 of the Labour Institutions Act, Section 10 of the Industrial Court's Act and Section 30 of the Labour Relations Act.

Mr. Nyandieka, learned Counsel for the Applicants on his part submitted that this court has jurisdiction to

hear and determine the Applicants motion since the Applicants were seeking an order of mandamus to compel the 1st Respondent to act on an application for registration of a federation and the Industrial Court has no powers to deal with the issue of failure or refusal to register a federation.

He pointed out that Section 30 of the Labour Relations Act (*hereinafter referred to as the Act*) only gave an aggrieved person the right to appeal to the Industrial Court against a decision of the Registrar made under the Act which was not applicable to the Applicants' case.

I have looked at the Labour Relations Act of 2007 which is the statute governing registration of Trade Unions, Employers organizations or Federations and Federation of Trade Unions and I have not come across any provision that ousts the jurisdiction of this court to hear and determine the Applicants' Notice of Motion.

The Act does not give the Industrial Court jurisdiction to entertain disputes regarding the Registrar's inaction or refusal to act on an application for registration of a trade union or confederation nor does the Labour Institutions Act – *see Section 12 thereof*.

Section 30 of the Act gives a right to a person aggrieved by a decision of the Registrar made under the Act to appeal against that decision to the Industrial Court. This provision, as correctly submitted by Mr. Nyandieka is not applicable to the applicants' case since the Registrar who is the 1st Respondent is yet to make any decision on the Applicants' application for registration of a federation of trade unions.

In fact, the complaint by the Applicants' is that the 1st Respondent has refused to act on their application and has therefore not made any decision on their application. It is also worth noting that the Applicants in this case are seeking the remedy of mandamus which can only be issued by this court in the exercise of its judicial review jurisdiction .The Industrial court has no power to issue such a remedy.

Lastly and with a lot of respect to Mrs. Guserwa, learned Counsel for the Interested Party, I wish to point out that it is common knowledge that the Industrial Court established under the Industrial courts Act 2011 had not been constituted by the time the current proceedings were filed in court and it is a bit unreasonable to expect that even supposing it had jurisdiction to determine this matter, the Applicants would have filed proceedings in a practically non-existent court.

For all the foregoing reasons, it is my finding that this court has jurisdiction to entertain, hear and determine the Applicants' Motion.

Turning now to the prayer for an order of Mandamus as sought in Prayer 1 of the Notice of Motion, the Applicants only complaint is that the 1st Respondent, The Registrar of Trade Unions had failed and/or refused to act on their application for registration of the federation of Public Service Trade Unions of Kenya (PUSETU – K) from 7th January 2011 to 24th August 2011 when the instant proceedings were instituted. It is the Applicants' case that the delay of 7 months without taking any action on the application including acknowledging its receipt is unreasonable and amounts to refusal to act and that therefore the 1st Respondent being a Public Officer who has a public duty imposed by statute to act on such applications should be compelled by this court using the order of mandamus to perform his aforesaid statutory duty.

In answer to the Applicants' case, the 1st Respondent admitted receipt of the said application for registration on 7th January 2011. He denied having refused to act as alleged explaining that the delay in acting was occasioned by his failure to obtain advice from the National Labour Board on whether or not to register the federation which was a statutory requirement.

As stated earlier, the Act is the statute that governs the registration of Trade Unions, Employers organizations or federation of Trade Unions. The Act gives the 1st Respondents the power and duty to receive applications for registration of the aforesaid organizations and the discretion to decide whether or not to register them as Trade Unions, Employers' Federation or Federation of Trade Unions

Section 16 thereof gives the requirements that a federation of Trade Unions must satisfy in order to qualify for registration while Section 18(3) provides for steps the Registrar may take when considering an application for Registration. These includes calling for further information necessary for evaluating the application and giving Applicants time to either rectify anomalies in the application within a specified time or altering proposed name if it is similar to another registered trade union or federation. If after evaluating the application the Registrar is satisfied that the trade union or federation should be registered, Section 19(1) thereof requires the Registrar to register the trade union or federation after consulting the Board.

Section 19(1) of the Act is an important provision for purposes of the instant proceedings and I think it is important to reproduce it in full

in order to appreciate its true meaning and import.

It states as follows;

“If the Registrar is satisfied, after consulting the Board, that a trade Union, employers’ organization or federation that has applied for registration meets the requirements of the Act, the Registrar shall register that trade union, employers organization or federation and shall-

(a) Issue a certificate of registration in Form B set out in the Second schedule; and

(b) Enter the name and details of the trade union, employers’ organization or federation in the appropriate register in Form C set out in the Second Schedule”.

Section 20 thereof empowers the 1st Respondents to refuse to register a trade union, employer’s organization or federation which does not meet the requirements for registration but it obligates the Registrar to give reasons for such refusal.

I have endeavoured to lay out in detail the law regarding registration of trade unions, employers’ organization or federation of trade unions so that from it the court can establish whether or not the Applicants are entitled to the relief sought in this case.

Before attempting to determine whether or not the Applicants are entitled to the order of mandamus as sought in this case, I think it is important to set out the law regarding the circumstances under which a court will issue an order of mandamus.

The Court of Appeal in the now celebrated case of Republic –Vs- Kenya National Examination Council, Exparte Geoffrey Gathenji & 9 Others C/Appeal No.266 of 1996 while discussing the scope and efficacy of the order of mandamus quoted with approval a passage from Halisbury’s Laws of England, 4th Edition Vol.I and expressed itself in the following terms:

“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 to 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.....The order must command no more than the party against whom the application is 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 out in a specific way”

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 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’.

Applying the principles enunciated by the Court of Appeal to the present case, there cannot be any doubt that the 1st Respondent had a public duty imposed by the various provisions of the Labour Relations Act discussed herein above to act on the application for registration of PUSETU –K by either taking the steps specified under Section 18(3) of the Act or by just evaluating it to confirm whether it satisfied the requirements for registration set out in Section 16 thereof. Section 19 and 20 of the Act gave the Registrar discretion to either register the federation or refuse to register it giving reasons for such refusal.

In his replying affidavit, the 1st Respondent has not denied that from 7th January 2011 to August 2011 when the proceedings herein were commenced, he had not acted on the Applicants’ application for registration of PUSETU – K. He averred that he was waiting to consult with the Board regarding the said application in a meeting scheduled for 30th August 2011. It is however instructive to note that the notice announcing the meeting scheduled for 30th August 2011 annexed as WKC2 does not show that registration of a federation of trade unions was one of the items on the Agenda for deliberation in that meeting. In any event the 1st Respondent did not explain why he had not sought the Board’s advice from January – August 2011 or in the previous two meetings held by the Board given his claim that the meeting of 30th August 2011 was the third meeting in the year.

Even without belabouring the point any further, I wish to state that I do not find any substance in the 1st Respondents explanation for failure to act on the Applicants’ application because even though he was required to consult the Board on issues regarding registration of federation of trade unions, the decision whether or not to register a trade union or a federation rested on him and not on the Board. The law only required him to consult the Board but he had the legal duty and obligation to act on all applications for registration of trade unions, employers organizations or federation of trade unions and after due consideration make a final decision one way or the other. The 1st Respondent cannot be allowed to abdicate his responsibility under the Act by hiding behind the statutory requirement for consultation. A reading of the Act does not give any indication that the Boards advice on matters of registration was meant to be binding on the 1st Respondent.

Be that as it may, even if the court was to accept even for a moment the Registrar’s contention that he had been waiting to receive the Board’s advice on the matter, the 1st Respondent has not tendered any evidence to show that he had made any attempts to consult the Board from January 2011 to the date these proceedings were instituted in August 2011. It was the 1st Respondents duty and obligation to seek consultations with the Board either as soon as receiving the application for registration or within a reasonable time. I find it ludicrous that the 1st Respondent would fail to take any steps to deal with the application or to consult the Board for seven months and then when confronted with his failure to act turns around to say that he was waiting for advice from the Board. How was the Board supposed to render advise on a matter that had not been placed before it? This is a question that the 1st Respondent did not apparently address his mind to and is another manifestation of his failure to perform his public duties under the Act.

In my view, the delay of 7 months to act on the application for registration of the federation (PUSETU – K) was inordinate, unreasonable and unjustifiable. In my opinion, it amounted to a refusal to act on the application which in turn translated to failure by the 1st Respondent to perform a public duty expressly imposed upon him by the Labour Relations Act. This failure by the 1st Respondent adversely affected the rights of the Applicants who are members of trade unions who constituted themselves as PUSETU-K and who desired to be registered as a confederation under the Act in order to attain legal recognition. They had a right under Article 41 of the Constitution of Kenya 2010 and Section 4 of the Act to form or join a federation of trade unions.

It is my finding that the 1st Respondent violated the Applicants legitimate expectations that he will follow the law and act on their application making a decision on it whether or not to register their federation within a reasonable time which he failed to do despite reminders by the Applicants. From the material

placed before the court, it is apparent that the 1st Respondent's failure to perform his public duty within a reasonable time occasioned prejudice to the members of trade unions constituted as PUSEU-K who included the Applicants herein by missing the opportunity and the possibility of presenting their nominee to the Salaries and Remuneration Commission.

In view of the foregoing, I am satisfied that the Applicants have demonstrated that they are deserving of the order of mandamus sought in Prayer I of their Notice of Motion dated 29th August 2011.

It is my finding that the application is merited and I accordingly issue an order of mandamus directed at the 1st Respondent to act on the application for registration of the Federation of Public Service Trade Unions of Kenya in accordance with the Law.

Considering that the applicants have only partially succeeded in their application and bearing in mind the reasons which forced the applicants to abandon one of the prayers in the Notice of Motion, I decline to make any order on costs. Each party to bear its own costs.

Dated, Signed and Delivered by me at Nairobi this 17th day of July, 2012.

C. W. GITHUA
JUDGE

In the presence of:

Florence - Court Clerk

Mr. Nyandieka for Applicants

N/A for 1st Respondent

Mr. Kwamotsa for 2nd Respondent

M/s Ashubwa holding brief for Mrs. Guserwa for Interested Party