



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME J.J.A)

CIVIL APPEAL NO. 16 OF 2017

BETWEEN

BENSON NGOMA MTUNGU.....1ST APPELLANT
LAWRENCE KATANA KENGA.....2ND APPELLANT
MAURICE OTIENO OLUNYA.....3RD APPELLANT
CAROLINE HELINDA AUMA MOBUTU.....4TH APPELLANT
MICHAEL OWINO.....5TH APPELLANT
HARRIET MBOLI MANGA.....6TH APPELLANT
SIMON NDOLO.....7TH APPELLANT

VERSUS

THE REGISTRAR OF TRADE UNIONS.....1ST RESPONDENT
TRANSPORT WORKERS UNION.....2ND RESPONDENT

(Being an appeal from the Judgment and decree of the Employment and

Labour Relations Court at Mombasa, (Hon Makau, J.)

dated 18th November, 2016

in

Mombasa E.L.R.C Cause No. 3 of 2016).

JUDGMENT OF THE COURT

[1] This is a second appeal, and that being so, only points of law fall for our determination and that is; whether the appellants' application for registration of a trade union to be known as Kenya Union of Container Freight Stations and Depots workers should be allowed. The same issue was heard by Registrar of Trade Unions who declined the appellants' application for registration, an appeal was filed and was fully heard before the Employment & Labour Relations Court (ELRC). In the circumstances it was imperative that all the factual issues were thrashed to a pulp in those forums and for us the issue is whether the learned Judge erred when he made the following conclusion which is at the core of this appeal:-

“After considering the foregoing provision, I do not find any merits in the appellants' contention that the respondent erred by seeking and acting on the advice from the National Labour Board. The respondent acted within the law when she sought the

advice from the Board. In addition I find merits in the said contention because the respondent never said that she refused to register the proposed union because she was bound by the advice from the board...

In view of the finding herein above that the respondent acted fairly and within the law in refusing to register the proposed union, I decline to grant the reliefs sought by the appellants. As a parting shot, I have to mention that the Trade Unions named as objectors during the application before the respondent ought to have enjoined as respondents or interested parties herein. That omission was wrong and prejudicial to the said objectors had the court allowed the appeal because they would have been condemned unheard."

[2] A brief synopsis of the matter is that the appellants are promoters and workers of employers dealing in container freight stations, container terminals and container depots, while the 1st respondent is the Registrar of Trade Unions, whose duties involve *inter alia*, the registration of trade unions in Kenya and the 2nd respondent (Transport Workers Union) was not a party of the proceedings before the Registrar but seems to have been joined in the court below as an interested party. The 2nd respondent nonetheless did not participate in this appeal. Be that as it may, the genesis of this dispute goes back to an application dated 25th March, 2015, by which the appellants applied for registration and issuance of a Certificate of Recruitment in respect of a proposed trade union, christened the 'Kenya National Union of Container Freight Stations, Forwarders and Depot Workers.' Following a protracted exchange of correspondence, the registration of the proposed union was withheld by the 1st respondent, who advised the appellants to reconsider their use of the word 'forwarders' in their proposed union name.

[3] In light of this, the appellants submitted a fresh application on 15th May, 2015, this time deleting the word 'forwarders' from the proposed name. However, this application too hit a snag, this time on account of objections raised with the 1st respondent by some pre-existing trade unions, namely the Kenya Union of Export and Import (KUEIW) and the Kenya Shipping Clearing and Warehouse Workers Union; who submitted that the category of workers that the appellants proposed to represent were already represented by themselves. As a result, they said, allowing the registration of the proposed union would lead to a duplication of trade unions and thus create disharmony in the sector. The 1st respondent duly considered the said objections and found them to be merited and on that basis, declined to register the proposed trade union.

[4] This did not sit well with the appellants, who saw the registrar's decision as arbitrary and without basis. Consequently, they lodged an appeal at the Employment and Labour Relations Court, challenging the decision. Essentially, the appellants argued that despite having met all the procedural requirements for registration, the 1st respondent declined to register their proposed union without any justifiable cause; that any objection raised by third parties to such registration ought to be based on the membership clause; that whereas the Kenya Union of export and import workers represents workers in the import and export industry, the proposed union does not and as such, no conflict would arise and lastly, that the attempt by the objector(s) to block the registration of the proposed union is plainly a ploy by greedy unions which are simply keen on recruiting members outside the ambit of its jurisdiction. The appellants contended that the 1st respondent as the custodian of the constitutions of all the registered trade unions should have appreciated this and registered the proposed union.

[5] The appeal before ELRC was opposed by 1st respondent and the 2nd respondent who successfully applied to be joined as an interested party. According to the 1st respondent, his decision not to register the proposed union was informed by the fact that an objection to the registration was raised by the third parties. Not only that, the 1st respondent also contended that he sought advice from the National Labour Board, which informed him that the category of workers proposed to be represented by the appellants' union were already substantially represented by the Kenya Union of export and import workers and the Kenya shipping, clearing and warehouses workers union. Consequently, that the registration of the proposed union would be duplicitous and would create disharmony in the sector. On its part, the 2nd respondent simply reiterated the submissions made by the 1st respondent.

[6] Having heard the respective submissions tendered by the parties, the **Makau, J.** delivered the judgment on 18th November, 2016, wherein he found the appeal lacking in merit and dismissed it. It is that judgment which has in turn provoked the present appeal. Before this Court, the appellants contend that the learned trial judge erred by:-

- 1. Finding that the appellants had not proved that the workers intended to be represented by the proposed union are not sufficiently represented by the already registered trade union;**
- 2. Finding that the registration of the new union will create disharmony;**
- 3. Declining to reverse the decision of the board to refuse the registration of the proposed union;**
- 4. Failing to progressively apply article 41 (2) (c) of the Constitution;**
- 5. Applying the limitation clause under Article 24, 36 and 41 of the Constitution and convention no. 87 and 98 of the International Labour Convention wrongly;**
- 6. Applying a statutory provision namely section 14 (1) (d) (i) of the Labour relations Act (LRA) to override Article 36 (1) and 41 (2) (c) of the Constitution;**
- 7. Finding that the respondents acted lawfully when she sought advice from the National Labour Board;**
- 8. Finding that the respondents acted fairly in refusing to register the proposed union and lastly;**

9. By declining to grant the relief sought by the appellants.

[7] With leave of the Court, parties ventilated the appeal through written submissions, which the appellants and the 1st respondent duly filed and which they solely relied on as they did not wish to make oral highlights. Counsel for the appellants, Messrs Mutisya & Associates took a four pronged approach in their written submissions. Firstly, they submitted that the appellants had proven their case on a balance of probability; to this end, they had demonstrated to the 1st respondent that they were targeting the hitherto unrepresented workers and that they even complied with the 1st respondent's directive with regards to the proposed name of the union. Secondly, that while the 1st respondent is allowed by law to consult with the National Labour Board, such consultations must be done reasonably and fairly and must not hinder the 1st respondent's mandate as the registrar of trade unions. The appellants contended that such was not the case herein, as the National Labour Board was never made privy to the all the salient facts of the case. Thirdly, counsel submitted that the application for registration was done in full compliance with the law and as such, the limitation imposed under Article 24 of the Constitution was inapplicable to this case. Lastly, the appellants faulted the learned trial judge for failing to give due regard to their submissions and authorities on the matter, which they said, resulted in the unlawful denial of relief to the appellants.

[8] On the part of the 1st respondent, learned Counsel Mr. Makuto submitted that the appellants failed to prove their case to the required standard; that the onus of proving that the employees were engaged in container freight stations, container terminals and depot companies and were not represented by other unions lay with the appellants. He added that contrary to what the appellants contend, **section 14 (1) (d) (i)** of the Labour Relations Act, 2007 (LRA) provides as follows:-

“A trade union may apply for registration if no other union already registered is in case of a trade union of employers or of employees is sufficiently representative of the whole or of a substantial proportion of the interests in respect of which the applicants seek registration”

The above section therefore places a limitation on the right availed under Article 41 (2) (c) of the Constitution and the Judge therefore cannot be faulted for finding as much.

[9] Lastly, counsel submitted that the requirements to be met in order for a trade union to qualify for registration were clearly set out under by the LRA, **section 19** in particular allows the registrar to consult the National Labour Board prior to making a decision on whether or not to register a proposed trade union. Given the foregoing, counsel urged this Court to find the appeal devoid of merit and dismiss it with costs.

[11] The jurisdiction of the Court below was in this case invoked under **section 30** of the LRA. The said provision is concerned with appeals against the decision of the Registrar of trade unions and states as follows;

“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.”

Consequently, in deliberating over the matter, the ELRC was in this case sitting under its appellate jurisdiction. That said, from the grounds of appeal and the submissions of the parties, the issue for determination in this appeal is as set out in the opening paragraphs of this judgment and what remedy if any avails to the appellants. Among the provisions of the law that the learned Judge has been faulted for not having applied properly, are **Articles 41 (2) (c)** of the Constitution as well as the limitation clause under section 14 (1) (d) (i) of the LRA. The appellants contended that the Judge was wrong in giving section 14 of the LRA precedence over Article 41 (2) (c) of the Constitution; failing to consider the overall object and purpose of an Act and the general rules of interpretation that enjoin a Court to embrace a purposeful liberal interpretation which requires the Constitution be read as a whole, without any one particular provision destroying the other and each sustaining the other.

[12] It is axiomatic that the right to participate in trade unionism is well protected by the Constitution under several Articles, for example under **Article 36 (1)** of the Constitution;

“Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.”

This is complemented by the provisions of **Article 41 (2) (c)** which provides as follows:

“(2) every worker has the right-

(a)

(b)

(c) to form, join or participate in the activities and programs of a trade union.”

[13] It can thus not be gainsaid that the appellants were well within their rights to come together to form a trade union. However, it is to be remembered that while so doing, the law has laid down a procedure to be met by those seeking such registration. This procedure is primarily found under the LRA. **Section 14** of which provides in part that;

“(1) A trade union may apply for registration if-

(a)

(b)

(c)

(d) *no other trade union already registered is-*

(i) in the case of a trade union of employers or of employees, sufficiently representative of the whole or of a substantial proportion of the interests in respect of which the applicants seek registration;”

In the present case, while the appellants presented their application in the required format and procedure, objections arose regarding the categories of workers from which they proposed to draw their membership. Two main unions that were operating and covering the same sector raised very strong objections to the proposed registration on the basis that the appellants’ union was likely to infringe on their turf. According to the letter dated 24th August 2015, the Kenya Union of Export and Import Workers (KUEIW) wrote to the 1st respondent stating in part as follows;

“It is noted that the sector that the applicant intends to represent is already represented by the Kenya Union of Export and Import Workers and the registration of the proposed trade union will lead to duplication of trade unions which may lead to disharmony in the sector.”

[14] In view of this and following consultations with the National Labour Board, the 1st respondent issued the appellants with a notification of refusal of registration dated 21st April, 2016, detailing reasons why the registration had been denied. As with everything else, this refusal to register the trade union was premised on the law. Under **section 20** of the LRA, if the Registrar is not satisfied that a trade union, employers’ organization or federation meets the requirements for registration and refuses the application for registration, the Registrar is required to advise the trade union, employers’ organization or federation of the reasons for that refusal. Consequently, the decision as to whether or not to register the trade union is left to the discretion of the Registrar, subject however, to an applicant’s satisfaction of the requirements set by **section 14** of the Act. In this case, having been informed of the likely duplication of operation areas, it was for the appellants to prove to the Court that the discretion was wrongly exercised and that there was little likelihood for duplication to occur.

[15] We further find the court below carefully reviewed the procedure that was followed by the registrar and the reasons given for the refusal and found they were well founded. The appellants fell short of demonstrating leave alone establishing that the Registrar of trade unions acted outside his mandate by consulting the Labour Board which is a statutory requirement. We need to stress that under **sections 107 and 108** of the Evidence Act, the burden is upon he who makes the allegation to prove it. Having failed to do so, the appellants cannot fault the Judge for deciding the appeal strictly on the basis of the statutory provisions.

Lastly, the appellants’ contention that the Judge ought to have found the 1st respondent’s consultation with the National Labour Board wanting, because the Board was never given the full facts nor were the appellants involved. Apart from the facts that the appellants did not point out the facts that were never given to the Board by the 1st respondent, or to point out the requirement of the law that required their involvement with the Board during the consultation we find this argument must also fail, as the same was never raised at the court below and has only come up for the first time in this appeal.

[16] In view of the foregoing, we find this appeal lacking in merit and the same is hereby dismissed. We are reluctant to award costs while noting the appellants are ingenious Kenyans who were perhaps (although mistaken) driven by good faith to form a trade union to give a voice to workers and at the same time find employment for themselves through creation of offices and revenue to be collected from the workers to pay themselves. In this regard we order each party to bear its own costs.

Dated and delivered at Mombasa this 17th day of May, 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M.K. KOOME

.....

JUDGE OF APPEAL

I certify that this is a
true copy of the original

DEPUTY REGISTRAR