



M'Mbolo & 6 others (Suing on behalf of the Proposed Kenya Union of Special & Professional Guards) v Registrar of Trade Unions; Kenya National Private Security Workers Union & another (Interested Parties) (Appeal 5 of 2020) [2024] KEELRC 150 (KLR) (7 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 150 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL 5 OF 2020
S RADIDO, J
FEBRUARY 7, 2024
APPEAL UNDER SECTION 30 OF THE LABOUR RELATIONS ACT, 2007)
IN THE MATTER OF APPEAL OF

BETWEEN

HESBON LUMUMBA M'MBOLO 1ST APPELLANT
JANET MUSIMBI OLWANGU 2ND APPELLANT
CAROLYNE MUKHWANA 3RD APPELLANT
JAIRUS KATERE SHAMALA 4TH APPELLANT
DEBORAH KERUBO OGAKE 5TH APPELLANT
ONGERA SAMSON OMECHI 6TH APPELLANT
WILFRED DIZUZA BOGONKO 7TH APPELLANT
SUING ON BEHALF OF THE PROPOSED KENYA UNION OF SPECIAL &
PROFESSIONAL GUARDS

AND

REGISTRAR OF TRADE UNIONS RESPONDENT

AND

KENYA NATIONAL PRIVATE SECURITY WORKERS UNION .. INTERESTED PARTY

CENTRAL ORGANISATION OF TRADE UNIONS INTERESTED PARTY

(Being an Appeal against the Respondent's decision in the Notification of Refusal to register, Form D dated 18 February 2020, conveying her refusal to register)



the Appellants proposed Kenya Union of Special & Professional Guards as was applied vide the Appellants application in Form A dated 9 October 2019)

JUDGMENT

1. On 10 February 2021, this Court stayed the proceedings herein pending the finalisation of an Appeal which was pending before the Court of Appeal.
2. On 6 December 2023, the Kenya National Private Security Workers Union informed the Court of Appeal that it wished to withdraw the Appeal, and the Court made an order marking the Appeal as withdrawn on the same day.
3. The Appellants then approached this Court on 13 December 2023, seeking an order vacating the stay orders of 10 February 2021.
4. The Court gave directions on 19 December 2023 and 20 December 2023, with judgment reserved for today.

Background

5. On or around 7 May 2017, the Appellants herein applied to the Registrar of Trade Unions (the Registrar) for a Certificate of Recruitment in respect of the Kenya Union of Special & Professional Guards (the proposed Union).
6. In a response dated 24 May 2018, the Registrar informed the Appellants that she could not issue the Certificate because security guards were already represented by the Kenya National Private Workers Union (the 1st Interested Party herein).
7. Dissatisfied, the Appellants appealed through Nairobi Appeal No. 9 of 2018, Hesbon Lumumba M'mbolo & Ors v Registrar of Trade Unions. The Registrar filed a replying affidavit in opposition to the Appeal.
8. The 1st Interested Party herein applied to be joined to the proceedings as an Interested Party. It and other parties were joined as Interested Parties.
9. The Court heard and allowed the Appeal. Consequent to the judgment, the Registrar issued a Certificate of Recruitment to the Appellants on 18 April 2019.
10. The Appellants thereafter formally applied for registration through a letter dated 11 October 2019.
11. The Registrar, upon receipt of the application by the Appellants on behalf of the proposed Union gazetted the application on 15 November 2019.
12. Upon the gazettment, the 1st Interested Party and the Central Organisation of Trade Unions (COTU) raised objections to the registration of the proposed Union.
13. The Registrar and the Appellants entered into an exchange of communication culminating in the Registrar writing to the Appellants on 20 February 2020 that she had refused to register the proposed Union.
14. The refusal prompted the Appellants to institute the instant Appeal on 25 March 2020, contending that



- i. The Respondent (Registrar of Trade Unions) erred in law and fact when she refused to register the proposed Kenya Union of Special & Professional Guards (KUSPROG) vide her communication notification of refusal in Form D dated 18 February 2020 purportedly issued pursuant to section 20 of the *Labour Relations Act*, 2007.
 - ii. The Respondent's notification of refusal in Form D dated 18 February 2020 made serious errors in law and in fact by declining the Appellants application for registration of the proposed KUSPROG on the grounds that the security guards are already represented by the existing Union.
15. Filed together with the Appeal was a Motion under a certificate of urgency seeking orders staying the decision of the Registrar refusing to register the proposed Union, amongst other orders.
16. On 8 April 2020, the Court directed that the Appeal be heard on a priority basis upon resumption of normal Court sittings (after COVID-19 lockdown).
17. However, on 23 June 2020, the Appellants filed a Motion seeking an order vacating the direction that the Appeal be heard upon resumption of normal Court proceedings.
18. The Court directed that the Motion be canvassed through submissions before the scheduling of a judgment date.
19. On 14 July 2020, the firm of Chwero & Co. Advocates filed a Notice of Appointment to act for the Appellants (the Appellants filed a Notice to act in Person on 11 August 2020).
20. On 18 August 2020 and 31 August 2020, the 1st Interested Party and COTU filed applications to be joined to this Appeal, and the Court allowed the applications on 5 October 2020.
21. When the parties appeared before this Court on 12 November 2020, the Court was informed that all the parties had filed and exchanged submissions and were awaiting judgment.
22. Since the Registrar's and Interested Parties' submissions were not on file, the Court directed that the same be placed on the file ahead of judgment.
23. The following are on record:
 - (a) Memorandum and Record of Appeal.
 - (b) Appellants' submissions filed on 20 July 2020.
 - (c) Respondents replying affidavit filed on 29 July 2020.
 - (d) Appellants' further affidavit filed on 4 August 2020.
 - (e) Appellants' supplementary affidavit filed on 30 September 2020.
 - (f) Appellants' supplementary submissions filed on 11 November 2020.
 - (g) COTU's submissions filed on 12 November 2020.
 - (h) The 1st Interested Party's submissions filed on 14 November 2020.
 - (i) Registrar's submissions filed on 16 November 2020.
24. In their submissions, the Appellants raised 8 Issues, to wit:



- (a) Did the Appellants' application for registration of the proposed Union (KUSPROG) in Form A dated 9 October 2019 meet all the legal parameters set out by the Act, for purposes of registration of KUSPROG?
 - (b) Did the Respondent exercise her statutory mandate lawfully while considering the Appellants' application, Form A, dated 9 October 2019?
 - (c) Is the sector under review (private security industries) sufficiently representative of its union representational interests?
 - (d) Did the Respondent in declining registration of the Appellants' proposed Union (KUSPROG) vide her notification of refusal to register, Form D dated 18 February 2020, act lawfully, reasonably, justifiably, fairly and judiciously in an open and democratic society?
 - (e) Did the Respondent's action, notification of refusal to register, Form D, dated 18 February 2020, informed by factual evidence/empirical figures?
 - (f) Can the Respondent's decision, notification of refusal to register, Form D dated 18 February 2020 stand the test of law?
 - (g) Can this Court disturb the Respondent's decision, notification of refusal to register, Form D dated 18 February 2020, issued pursuant to section 20 of the LRA, 2007?
 - (h) Are the Appellants eligible for remedies and reliefs sought?
25. The Registrar on her part identified 2 Issues:
- (a) Whether the refusal to register the proposed Union amounts to an infringement of the Appellants' constitutional rights?
 - (b) Whether the interest intended to be covered by the proposed Union is adequately covered by other registered trade unions?
26. The 1st Interested Party identified the Issues as:
- (a) Whether the Issues raised in this Appeal are res judicata and the suit offends the provisions of section 6 of the [Civil Procedure Act](#)?
 - (b) Whether the interest intended to be covered by the proposed Union is adequately covered by the Kenya National Private Security Workers Union, the 1st Interested Party?
 - (c) Whether the integrity issues facing the Appellants is allowed in law in terms of purported officials?
 - (d) Whether or not the Respondent exercised her mandate properly in accordance with the law in refusing to register the proposed Union?
 - (e) Whether the suit should be struck out?
 - (f) Who is to bear the cost of this Appeal?
27. COTU saw the Issues in near similar lenses with the 1st Interested Party, and it asked the Court to examine the questions:
- (a) The Court needs to first certify if the appeal holds any water given that there is a matter Civil Appeal No. 154 of 2019 that deals with the same issue before this Court where a final ruling is yet to be delivered.



- (b) Whether the members to be covered by the proposed Union are adequately covered by the 1st Interested Party's Union?
 - (c) Whether the integrity issues facing the Appellants' is allowed in law in terms of purposed officials?
 - (d) Whether or not the Respondent acted in accordance with the law in refusing to register the proposed Union?
 - (e) Whether the suit should be struck out?
 - (f) Who is to bear the cost of this appeal?
28. The Court has considered all the material placed before it.

Competence of Respondents replying affidavit

29. Through the further affidavit filed on 4 August 2020, the Appellants urged the Court to strike out the Respondents replying affidavit because it was filed outside the timelines given by the Court on 23 June 2020.
30. Since the Appellants responded to the depositions in the Respondents replying affidavit in the further affidavit, the Court will allow the replying affidavit despite being filed late without leave, in the interest of justice and to determine the real issues in dispute.

Res judicata

31. The 1st Interested Party and COTU objected to the competence of the Appeal on the ground that there were pending proceedings Civil Appeal No. 154 of 2019, Kenya National Private Security Workers Union v Hesbon Lumumba & Ors, where the subject of the dispute was the same as herein.
32. The Appeal cited by the 1st Interested Party and COTU emanated from a judgment of this Court (differently constituted) in Appeal No. 9 of 2018, Hesbon Lumumba M'mbolo & Ors v Registrar of Trade Unions.
33. The judgment addressed the question of the Registrar's refusal to issue the Appellants with an interim Certificate of Recruitment under section 12 of the *Labour Relations Act*.
34. The instant proceedings however challenge the refusal of the Registrar to register the proposed Union in terms of section 20 of the *Labour Relations Act*.
35. The Issues are therefore distinct though closely interwoven.
36. In the circumstances, the Court finds that res judicata does not apply.

Sub judice

37. On the related question of sub judice, it is not in dispute that a Certificate of Recruitment issued pursuant to section 12 of the *Labour Relations Act* is a statutory sine qua non for the registration of a trade union.
38. The Court (differently constituted) found the refusal by the Registrar to issue the Certificate of Recruitment unlawful and ordered her to issue one to the proposed Union.



39. The decision of the Court in respect to the Certificate of Recruitment was under challenge before the Court of Appeal in Civil Appeal No. 154 of 2019, Kenya National Private Security Workers Union v Hesborn Lumumba & Ors.
40. The Appeal has since been terminated after being withdrawn by the 1st Interested Party and the question of sub judice does not therefore arise.

Integrity questions facing the Appellants

41. The 1st Interested Party contended that some of the Appellants did not operate within the security sector and thus could not lead a trade union in the sector and further that some of them had integrity issues facing them including forgery of documents. The 1st Interested Party drew the attention of the Court to court faces involving some of the Appellants.
42. Despite making the claims of the Appellants' integrity, the 1st Interested Party did not place before the Court any verifiable evidence to support the allegations.
43. It is also noteworthy that the Registrar's decision was not informed by the allegations of the Appellants' integrity and the Court rejects these concerns.

Whether the Registrar exercised her discretion lawfully?

44. The Appellants asserted that the Registrar's decision to deny them registration violated the rights of over 40,000 of their members to freedom of association, to form a trade union and fair labour practices.
45. According to the Appellants, the Registrar failed to consider that the industry had over 400,000 potential members out of which it had recruited 40,000, and that the Kenya National Private Security Workers Union had a membership of slightly above 70,000.
46. The Appellants also accused the Registrar of discrimination and ignoring precedent because the Registrar had previously registered multiple unions within the education sector (KNUT, KUPPET, UASU, KUSU among others); the transport sector (Transport Workers Union, Long Distance Truck Drivers Workers Union, Matatu Workers Union); the shipping sector (Kenya Shipping, Freight, Logistics and Warehouse Workers Union and Dock Workers Union), the agricultural sector, the aviation sector (Kenya Aviation Workers Union, Aviation and Airport Services Workers Union and Kenya Pilots Association) amongst other sectors.
47. The Registrar on her part contended that she declined to register the Appellants' proposed union because there was already in existence a registered trade union sufficiently representative of the whole or a substantial proportion of the interests in which the Appellants sought registration.
48. The Registrar also deposed that the Kenya National Private Security Workers Union had recognition agreements with at least 25 employers within the sector (the number increased to 29 in the submissions), and that the registration of a new union could danger industrial peace and harmony within the sector.
49. The Registrar further averred that the Appellants had not provided any evidence that its purported members listed in the application were employees within the private security sector and that some of the names belonged to employees who had resigned from a firm the 1st Interested Party had a recognition agreement with.
50. The 1st Interested Party took the position that its Constitution mandated it to represent the interests of employees within the private security sector, and it sufficiently represented a substantial portion



of the employees as it had collective bargaining agreements with about 14 employers and recognition agreements with 99 security firms.

51. To put the dispute into context, and in order to address the real issues in dispute, it is necessary to set out the terms of the Registrar's letter notifying the Appellants that their application for registration had been declined.

52. The letter stated:

It is notified that the registration of Kenya Union of Special and Professional Guards as a trade union under the *Labour Relations Act* is refused. The grounds for refusal are as follows: -

The envisioned scope of representation being workers providing customised private security and guarding services to the public and private entities, individuals businesses, private investigators, marshals, bouncers and other related services, are already represented by the existing union of the Kenya National Private Security Workers Union (KNPSWU). Under its registered constitution, KNPSWU represents persons employed in any capacity and in any ordinary office or post in any private security firms, courier firms ran and managed by private security firms, private investigators, security guards, warders, rangers, VIP guards, bouncers and cash escorts.

The KNPSWU has adduced documentary evidence indicating that it has a membership of over 72000 members and has signed collective bargaining agreements with fifteen (15) security companies. According to the record held in our office for the annual returns for the year 2018, the membership of KNPSWU is 77008 members.

While the Appellant has indicated that they have recruited over 40000 members in their letter dated 11th December 2019, however, this notwithstanding, the *Labour Relations Act* provides under section 14(1)(d) that a trade union may apply for registration if no other trade union already registered is sufficiently representative of the whole or substantial proportion of the interests in respect of which the applicants seek registration.

The law therefore provides that no activities shall be organised by a group in respect to the particular class of workers if another union is in place for those activities and its members or substantial majority of them are not suffering any deficiency.

53. The Supreme Court addressed its mind to the parameters for the registration of a trade union in Kenya *Plantation & Agricultural Workers Union v the Kenya Export Floriculture, Horticulture & Allied Workers Union* represented by its promoters & Ors (2020) eKLR, where it held:

We have carefully perused the provisions of sections 12, 13 and 14 of the Employment and *Labour Relations Act* (sic) – should be the *Labour Relations Act* and other relevant statutory and constitutional provisions in respect to the issue in question. It is clear in our mind that once an application for registration of a trade union has been made and the same is compliant with the aforesaid sections and *the Constitution*, the Registrar of Trade Unions has no choice but to register the same. The only reason for refusal of registration is where there is another trade union sufficiently representative of the whole or a substantial proportion of the interests in respect of which the applicants seek registration as provided under section 14(1)(d) of the same Act. The Registrar has to make an inquiry on any objection before arriving at a decision to reject or allow an application.

54. In the present Appeal, the Registrar and 1st Interested Party have not controverted the Appellants' assertions that the private security sector has nearly 400,000 potential unionisable employees and that the 1st Interested Party has a membership of about 77,000.



55. The Registrar did not indicate in her replying affidavit that she had conducted an inquiry on the potential membership of unionisable employees within the private security sector to determine whether the 1st Interested Party was sufficiently representative of the workers in the sector.
56. Equally not disclosed was the number of security firms in the sector to enable the Court to determine whether the 29 or so employers constituted a substantial proportion of employers in the private security sector.
57. While conducting an inquiry, the Registrar was expected to establish some of the facts in the preceding paragraphs. It was not enough for the Registrar just to look at the records placed before her by the protagonists since the sector in contention is a regulated sector. She should have been proactive in conducting an inquiry.
58. The 1st Interested Party cannot truly be sufficiently representative of the whole or a substantial proportion of the interests of the 400,000 or so unionisable employees within the private security sector. It barely represents 20% of the unionisable employees in the sector.
59. The Court finds that the Registrar did not exercise her discretion lawfully.

Conclusion and Orders

60. From the foregoing, the Court declares and orders:
 - a. That this Appeal be allowed.
 - b. That the Registrar failed in her statutory duty in declining to register the proposed Kenya Union of Special and Professional Guards.
 - c. That the Registrar do register the proposed Kenya Union of Special & Professional Guards within 30 days.
61. Costs in the cause.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 7TH DAY OF FEBRUARY 2024.

RADIDO STEPHEN, MCI Arb

JUDGE

Appearances

For Appellants Mr. Shammala, Interim Secretary General, Kenya Union of Special & Professional Guards

For Respondent Ms. Essendi, Senior Litigation Counsel instructed by the Office of the Hon. Attorney General

For 1st Interested Party in person

For 2nd Interested Party Mr. Okello, Advocate, Central Organisation of Trade Unions

Court Assistant Chrispo Aura

