



Ngaira & another v Registrar of Trade Unions & another; Union of Kenya Civil Servants & another (Interested Parties) (Employment and Labour Relations Appeal E019 of 2021) [2023] KEELRC 125 (KLR) (26 January 2023) (Judgment)

Neutral citation: [2023] KEELRC 125 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E019 OF 2021
ON MAKAU, J
JANUARY 26, 2023
IN THE MATTER OF THE PROPOSED KENYA NATIONAL UNION OF ENVIRONMENTAL HEALTH SCIENTISTS

BETWEEN

ANTHONY MUNGAHU NGAIRA 1ST APPELLANT

ABDUN DENG DUBA 2ND APPELLANT

AND

REGISTRAR OF TRADE UNIONS 1ST RESPONDENT

NATIONAL LABOUR BOARD 2ND RESPONDENT

AND

UNION OF KENYA CIVIL SERVANTS INTERESTED PARTY

KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL INSTITUTIONS & HOSPITALS & ALLIED WORKERS INTERESTED PARTY

JUDGMENT

1. The appellants are promoters of the proposed Kenya National Union of Environmental Health Scientists. Through the law firm of Ngugi Kamau Advocate they wrote to the 1st respondent letter dated September 10, 2021 referenced “Proposed Registration Of Kenya National Union Of Environmental Health Scientists Under Section 12 And 13 Of The *Labour Relaitons Act*.”
2. The letter was signed by the promoters and attached copies of their National Identity Cards, their Appointment letters, licences from the Public Health and technicians council, and the Schemes of



- service for Public Health officers and Technicians as published by the Public Service Commission. The letter was served on the 1st respondent on October 22, 2021 but no response was received.
3. On November 22, 2021 the appellants' lawyers wrote another letter to remind the 1st respondent to respond. The letter attached copy of the earlier letter of September 10, 2021. The letter was received by the 1st respondent on November 23, 2021.
 4. However as at that time the 1st respondent had already responded to the initial letter by a letter dated October 26, 2021 referenced "Application For A Certificate –the *Labour Relations Act*, Kenya National Union Of Environmental Scientists." The letter informed the appellants that their application had been refused because a similar application by Kenya Environmental Health and Public Health Practitioners Union had been refused by the National Labour Board in its meeting held on 13th-October 14, 2021. She further informed them that the earlier application was refused on ground that public Health Practitioners are engaged in institutions like hospitals, the public service and other government agencies and therefore sufficiently represented by the existing registered unions namely Kenya Union of Civil Servants (UKCS) and Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA).
 5. The appellants were aggrieved and filed a Memorandum of Appeal on November 3, 2021 challenging the whole decision. On March 7, 2022, the Appellants filed amended Memorandum of Appeal raising 11 grounds of appeal and urging the court to declare the 1st respondent's decision through the letter received by them on November 23, 2021 unlawful, null and void. They also ask the court to issue a mandatory injunction directing the 1st respondent to forthwith register the Kenya National Union of Environmental Health Scientists. Finally the appellants pray for costs of the appeal and any other relief that the court deems fit in the circumstances.
 6. The 11 grounds of appeal were collapsed into 2 in the appellants' written submissions namely;
 - a. The grounds advanced by the 1st respondent to refuse registration of their trade union are not valid and reasonable.
 - b. The 1st and 2nd Interested Parties cited in the impugned decision are not substantially representative of the interests of the intended members of the Appellants.
 7. The respondents and the interested parties filed separate responses to the appeal urging the court to dismiss the appeal for lack of merits. The 1st respondent filed response clarifying that what was refused was not an application for registration of a trade union but an application for certificate for establishment of the union and recruitment of members. The 2nd Respondent denied knowledge of the appellant's application and asked the court to release it from the proceedings because it played no role in the impugned decision. The interested parties supported the impugned decision contending that they substantially represent public health practitioners and urged the court to dismiss the appeal.
 8. The appellants filed rejoinder to the responses by the respondents and the interested parties contending that the application which was refused was for registration of the proposed trade union and not certificate for recruitment of members as alleged by the 1st respondent. They further contended that the interested parties are jacks of all trade who cannot effectively represent the environmental scientists.

Submissions

9. It was submitted for the Appellants that the reasons advanced by the 1st respondent to refuse registration of the appellants' union were not valid and reasonable. The reason was that a similar application had been made in respect of Kenya Environmental Health and Public Practitioners



- (KEHPPU) Union, and was rejected by the National Labour Board in its meeting held on 13-October 14, 2021, on grounds that the 1st and 2nd Interested Parties sufficiently represents the intended scope.
10. It was further submitted that every employee has right under Article 41(2) (c) of *the Constitution* to form, join or participate in the activities and programs of a trade union. It was contended that the office of the 1st Respondent is bound by the Bill of rights and placed reliance on the case of *Seth Panyako and 5 others vs. Attorney General & 2 others* (2013) eKLR and *Peter Karegua Mwanga and others vs. Registrar of Trade Unions and 2 others* (2021) eKLR.
 11. It was submitted that Article 24 of *the Constitution* bars limitation of a right or fundamental freedom except by law and only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.
 12. The second issue raised in the submissions is that 1st and 2nd Interested Parties are not substantively representative of the interests of the intended members of the appellants. The court was told that Environmental Health Scientists perform duties and responsibilities that are alienated by the Public Health officers and Technicians Scheme of Service (2013) as well as the Public Health officers and Technicians scope of practice, and the Public Health Officers (Training, Registration and Licensing Act (2013). The interested parties were described as jack of all trade who cannot effectively represent the interests of the Environmental Health Scientists and Technicians.
 13. For emphasis reliance was placed on the case of *David Benedict Omulama & 8 others v Registrar of Trade Union & another* (2014) eKLR. It was further submitted that the interested parties' assertion of sectoral hegemony cannot stand the test of sufficient representation since they are jack of all trade representing all manner of workers in hotels, schools, homes and even churches.
 14. The respondents did not file submissions to the appeal but relied on their responses already filed and urged the court to dismiss the appeal.
 15. The 1st Interested Party submitted only on the issue whether the 1st respondent violated the appellants' rights by the letter dated October 26, 2021. From the onset, the 1st interested party acknowledged that a worker has freedom of association and labour rights under Article 36 and 41 of *the Constitution*. However, it was submitted that the said rights are limited under Article 24 of *the Constitution* and Section 14 of the *Labour Relations Act*.
 16. For emphasis, reliance was placed on the case of *Felix Musyoki Sammy & 6 others v Registrar of Trade Unions & another* (2016) eKLR and *Charles Salano & 9 others (Proposers & Promoters of Kenya Supermarkets Workers Union (KESMWU) v Registrar of Trade Union & another* (2017) eKLR where the court appreciated that the rights under Article 36 and 41 of the *Constitutions* are not absolute and their limitation by Section 14 of the *Labour Relations Act* is reasonable and justifiable in an open and democratic society. Consequently, it was submitted that the reason advance by the 1st respondent to refuse registration of the appellants' union are justifiable and within the law.
 17. As regards the issue of representation, it was submitted that, a trade union need not represent everybody but only cover a substantial proportion of the interests. For emphasis, reliance was placed on the case of *Joel Mbutia & 2 others v Registrar of Trade Unions & another* (2018) eKLR and *Benson Ngoma Mtungu & 6 others v Registrar of Trade Unions & Another* (2018) eKLR.
 18. The 2nd Interested Party submitted that the orders sought by the appellants are contrary to section 14 of the Labour Relations Act, and they should not be granted. It was argued that the appellants are attempting to encroach a sector which is fully and sufficiently represented by the two interested parties



herein. Further the constitution of the appellant is a just copy-pasted from the 2nd Interested Party's constitution.

19. For emphasis, reliance was placed on the Court of Appeal decision in Charles Salano & 9 Others v Registrar of Trade Unions & Another (2018) eKLR where the court held that the limitation of the appellants' rights under Article 36 and 41 of the Constitution was reasonable and justifiable in an open and democratic society.
20. In this case it was contended that the power vested in the Registrar of Trade Unions and the limitation of the said rights play an important role of preventing proliferation of Trade Unions and negative competition and wrangling amongst unions in a single sector.
21. To fortify the foregoing submission, reliance was placed on the Court of Appeal decision in Benson Ngoma Mtungu & 6 others v Registrar of Trade Unions & Another (2018) eKLR where the court held that the sector intended by the appellant was already represented and as such the proposed trade union would lead to duplication of trade unions which could lead to disharmony in the sector.
22. It was further submitted that the reliefs sought are in bad faith and if granted would lead to confusion and conflict between the existing trade unions and the proposed new union. Finally it was argued that the Registrar has already exercised her discretion under Section 19 and 31 of the Labour Relations Act upon good reasons and as such the appeal should be dismissed with costs.

Analysis and Determination

23. Having carefully considered the rival submissions and the record of appeal, the following issues commend themselves for determination:
 - a. Whether the appellants' application vide the letter dated September 10, 2021 was for a certificate for establishment of the proposed trade union or registration of the union.
 - b. Whether the 1st respondent was wrong in refusing the said application.
 - c. Whether the court should grant the orders sought by the appellants.
24. This being a first appeal, the court is obliged to review the evidence on record and come up with its independent conclusions bearing in mind that it should not interfere with any finding of fact by the Registrar of the trade unions unless there is demonstration that the finding was not supported by evidence or it was arrived at in contravention of an express provision of the law or a principle of law.

The application dated September 10, 2021.

25. The appellants contended that their application vide the letter dated September 10, 2021 was for Registration of a trade union and disputed the allegation by the 1st respondent that it was an application for a certificate to recruit members. The 2nd Appellant deposed in the further Affidavit sworn on May 25, 2022 as follows;
 3. "That I have read through the 1st Respondent's Response to appeal sworn by Elizabeth Gicheha, the 1st Respondents herein. I have otherwise had the same explained to me by my Advocates on record and wish to respond as follows.
 3. That from the onset, the Appellants made an Application for the registration of a trade union referenced;
"Proposed registration of Kenya National Union of Environmental Health Scientists."



26. Having considered the foregoing evidence taken under oath, I find and hold that the appellant has admitted that the application contained in the letter dated September 10, 2021 was not for a certificate for establishment of the proposed trade union but for the registration of the proposed union.

Was the 1st Respondent wrong in refusing the appellants application.

27. Part III of the Labour Relations Act provides for the procedure of Establishment and Registration of Trade Unions and employers' organizations. Section 12 (1) of the Act bars recruitment of members for a proposed trade union unless the promoters thereof have obtained a certificate from the Registrar of trade unions under the said section. Subsection (2) sets out the basic requirements for an application for aforementioned certificate.

28. Subsection (3) then provides that the Registrar shall issue the certificate within thirty days unless;

a. "the application is defective; or

b. The name of the proposed trade union or employers' organization is the same as that of an existing trade union or employers' organization or is sufficiently similar so as to mislead or cause confusion."

29. On the other hand Section 13 provides that a trade union shall apply for registration within 12 months of receiving a certificate issued under section 12 of the Act. Section 14 (1)(d) then limits the right to apply for registration if there is another trade union already registered which is sufficiently representative of the whole or a substantial proportion of the interest in respect of which the applicants seek registration.

30. Having made a finding of fact that the appellants have admitted that their rejected application was for registration and not establishment of a trade union, I must hold that the said application was premature and incompetent. It cannot stand the test of a competent application for registration because it is seeking for registration of a non-existent trade union.

31. If the appellant intended to have their proposed union registered, they ought to have first applied for a certificate under Section 12 of the Act to enable them recruit members and establish the trade union. The 1st respondent would have issued them with the certificate within 30 days unless the application was defective or the name of the proposed union was similar or substantially the same as that of an existing trade union.

32. Only then, and within six months from the date of receipt of the said certificate, would the appellant be entitled to apply for registration of their proposed union under Section 13 of the Act for consideration by the 1st Respondent with advice of the 2nd Respondent. That is the proper procedure for establishment and registration of trade unions in Kenya but as demonstrated above, the appellant breached the said legal process when they jumped the initial step of seeking certificate under section 12 of the Act and went straight for the registration of the proposed trade union.

33. In view of the foregoing observations and finding, I hold that the 1st Respondent was right in refusing the appellants application for registration of the proposed trade union, albeit for the wrong reason. The proper reason ought to be that the appellants did not comply with the procedure set by the law for establishing and registration of trade unions. Consequently the answer to the question above is that the refusal of the application by the appellants did not violate the appellants' rights under Article 36 and 41 of the Constitution, as the application was incompetent and premature.



Reliefs sought

34. In view of the finding that the appellants' application for registration of the proposed trade union was premature and not in compliance with the procedure set out in part III of the Labour Relations Act, I must hold that the appellants are not entitled to the reliefs sought vide the Amended Memorandum of Appeal herein. The application was validly refused and as such the order sought to compel the 1st Respondent to register the proposed trade union is declined. In the end the appeal is dismissed with costs.

Dated, signed and delivered at Nyeri this 26th day of January, 2023.

onesmus n makau

judge

Order

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE

