



Oira & another v Registrar of Trade Unions & 2 others (Employment and Labour Relations Appeal E015 of 2021) [2023] KEELRC 1071 (KLR) (27 April 2023) (Judgment)

Neutral citation: [2023] KEELRC 1071 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E015 OF 2021
ON MAKAU, J
APRIL 27, 2023

BETWEEN

EPHONE NYANGENA OIRA 1ST APPELLANT

LUKAS KINUTHIA NYARARA 2ND APPELLANT

AND

REGISTRAR OF TRADE UNIONS 1ST RESPONDENT

THE HON.ATTORNEY GENERAL 2ND RESPONDENT

KENYA NATIONAL UNION OF NURSES 3RD RESPONDENT

(Being an Appeal from the decision of the Registrar of Trade Unions, E.N.Gicheha (Mrs) vide a letter dated 26th October, 2021)

JUDGMENT

1. The appellants are promoters of proposed Nurses and Midwives Union of Kenya (NMU-K). On 7th October 2021 they applied to the 1st respondent (Registrar) for certificate under section 12 of the Labour Relations Act to initiate the process of forming the proposed trade union. The Registrar declined to issue the appellants with the certificate vide the letter dated 26th October 2021. The reason for the refusal to issue the certificate were that the name of the proposed union is sufficiently similar to Kenya National Union of Nurses, an existing registered trade union. Further the Registrar noted that the workers targeted for representation are sufficiently represented by the Kenya National Union of Nurses.
2. The appellants seeks to overturn the said decision majorly on the following grounds of appeal:-
 - a. The Registrar erred in law and fact by stating that the proposed NMU-K has a similar name as Kenya National Union of Nurses (KNUN).



- b. The Registrar erred in law and fact in refusing, declining and/or rejecting to issue certificate to the appellants under Section 12 (1) and (2) of the Labour Relations Act, and to register NMU-K.
 - c. The Registrar erred in law and fact in referring the appellants' application of the certificate as statutory barred.
 - d. The Registrar has infringed the appellant's rights under Article 36 (1) and 41(2) (c) of the Constitution by refusing to register the proposed NMU-K.
3. The appellant prays for:-
- a. The appeal be allowed.
 - b. The proposed Nurses and Midwives Union of Kenya (NMU-K) be allowed to continue with recruitment and registration of members.
 - c. Declaration that the appellants have a Constitutional right to form, join, to leave and to participate in the activities or programs of a trade union of their choice.
 - d. The impugned decision made by the Registrar on 25th October 2021 be reversed.
 - e. The Registrar do issue certificate and Registrar NMU-K and issue it with certificate of Registration in Form B set out in the second schedule of the Labour Relations Act within 14 days from the date of the court's decision.
 - f. Costs of the appeal is awarded to the appellants.
4. The Kenya National Union of Nurses (KNUN) applied successfully to be joined in the suit as the 3rd Respondent. The Registrar and the KNUN filed Replying Affidavit to oppose the appeal. The gist of the responses is that the grounds cited by the Registrar in the impugned decision were valid and the appeal should be dismissed with costs.

Submissions

5. The appellants submitted on the following issues:-
- a. Whether they satisfied all the statutory requirements for registration of the proposed trade unions (NMU-K).
 - b. Whether the refusal to register the proposed trade union amounts to infringement of rights of appellants and the proposed union's members, to form, join and participate in activities and programs of a trade union of their choice.
 - c. Whether the Registrar was justified to find that the target membership was already sufficiently represented.
 - d. Whether existence of other trade union are justified reason under Article 24 (1) and 41 of the Constitution to limit the appellants' right to form, join and participate in the activities and paragraphs of a trade unions of their choice.
 - e. Who pays costs.
6. It was submitted that the refusal to register the proposed union was not because there was failure to meet the requirements for registration. It was contended that the application letter laid out the geographical scope, mandate and membership of the NMU-K and the Registrar never faulted the same.



7. As regards ground 2, 3 and 4 of the appeal, it was submitted that the Registrar erred in law and fact in stating that the proposed NMU-K has similar name as the KNUN. It was further submitted that the Registrar fell into error when she refused to issue the certificate under section 12 (1) and (2) of the Act before considering the mandate and membership of the proposed NMU-K. Therefore the decision infringe of the appellants' rights as provided in Article 36(1) and 41 (2) (c) of the Constitution .
8. It was further submitted that Article 20 of the constitution provides that every person shall enjoy the rights and fundamental freedoms or the Bill of rights to the greatest extent consistent with the nature of this right or fundamental freedom. Consequently, refusal to register the NMU-K was a death blow and denied the appellants and other persons, right to join or participate in activities of NMU-K. The said limitation was subject to Article 24 of the Constitution .
9. For emphasis, reliance was placed on Hon. Justus Aloo Ogella, Ouma Juma & Others v Union of Cooperatives Staff & Registrar of Trade Unions and Seth Panyako & 5 others v Attorney General of Registrar of Trade Unions.
10. For the 3rd Respondent, it was submitted that the appeal as filed is fatally defective as it breaches Section 12 (2) (a) and 30 of the Labour Relations Act, and Rule 8 (1) and (4) of the ELRC Rules because it was filed after 30 days and without a complete record. For emphasis reliance was placed on the case of Laban Mokuia & 9 others v Registrar of Trade Unions & Another [2014] eKLR, and the case of County Executive of Kisumu v County Government of Kisumu & 8 others [2017]eKLR where the court held that no late appeal can be filed without leave of the court.
11. Further it was submitted that the application for certificate offended section 52 (2) (a) of the Act because it was signed by the applicants' lawyer and not the required 2 promoters. Again the appeal offended Rule 8 of the ELRC Procedure Rules by introducing new documents during the appeal.
12. As regards the merits of the appeal, it was submitted that the Registrar was right in rejecting the application for a certificate under section 12 of the Act. It was submitted that the Registrar has a discretion whether or not to issue the certificate pursuant to section 12(3) of the Act. It was submitted that the name of the proposed union is sufficiently similar to that of the 3rd Respondent so as to mislead and cause confusion. Further that the proposed membership are workers who are sufficiently represented by the 3rd respondent (KNUN).
13. For emphasis, reliance was placed on the Court of Appeal decision in Benson Ngoma Matungu & 6 others v Registrar of Trade Union & another [2018] eKLR where it was held that the Registrar of trade union has discretion to register or not to register a trade union and the appellants has a burden of proof that the discretion was wrongly exercised, and that there was little likelihood for duplication to occur. In the present case, it was submitted that the refusal to issue a certificate was right and therefore no constitutional rights were violated.
14. On the contrary, it was submitted that the appellant had already engaged in illegal recruitment of members to the proposed union even before obtaining any certificate under Section 12 of the Act. For emphasis, pages 50-89 of the record of appeal were cited being list of names of persons who allegedly had resigned from the 3rd Respondent (KNUN) to join the proposed union NMU-K. The said members had however continued to pay union subscription to the 3rd Respondent. Hence the recruitment was illegal and fraudulent.
15. It was further submitted that the proposed NMU-K is a splinter group from the KNUN led by one Halima Adan Ahmed who lost in the attempt to clinch the position of General Secretary of KNUN.



16. As regards the reliefs sought, it was submitted that the NMU-K cannot be allowed to continue recruiting members in the absence of a certificate issued by the Registrar under section 12 of the [Labour Relations Act](#). Further, the prayer for issuance of certificate and to register the NMU-K as a trade union under the Act cannot issue before the appellants meet the criteria for applying for the certificate and apply for registration within six months of receiving the initial certificate.
17. For emphasis, reliance was placed on the case of [Justus Aloo Ogeka & 6 others v Republic of Trade Unions & 2 others](#) (2016) eKLR, and [Seth Panyako & 2 others v Attorney General & 2 others](#) [2013] eKLR.

Analysis and Determination

18. The issues for determination are:-
 - a. Whether the appeal is fatally incompetent.
 - b. Whether the Registrar erred in refusing to issue a certificate to the appellants under section 12 of the [Labour Relations Act](#).
 - c. Whether the reliefs sought are merited.

Incompetent Appeal

19. The 3rd respondent contends that the appeal is time barred and/or contains documents added after filing the appeal contrary to Rule 8 of the [ELRC Procedures Rules](#). Rule 8 provides that an appeal to the court shall be by filing a memorandum of appeal within the time specified by a written law and if not specified, within 30 days from the date the impugned decision was delivered. The memorandum of appeal is to be accompanied by all documentary evidence relied on and a copy of the judgment from the proceedings of the matter being appealed against,

“Provided that where copies of the proceedings are not filed with the memorandum of appeal, the appellant shall file such copies as soon as possible and within a reasonable time.”
20. In this case, the appellants filed Memorandum of Appeal on 22nd November 2022 followed by a bundle of the record of appeal on 9th December 2022. In consideration of the cited proviso to Rule 8 (4) [ELRC Rules](#), above, the appeal is competently before the court. I say so because an appellant is allowed to file a memorandum of appeal without the full record of appeal and thereafter file the record of appeal within reasonable time. In this case the memorandum of appeal was filed within 30 days of the impugned decision and filed the record of appeal 18 days thereafter. The interval between the filing of the two documents was reasonable.

Refusal to issue certificate

21. The refusal to issue certificate to the appellants was notified vide the letter dated 26th October, 2021. Thus:-

“Mwakio, Kiirwa & Company Advocates,
Uniafric House,
4th Floor, Room 459,
O Box 58658-00200.
Nairobi.



Re: Application For A Certificate –the Labour Relations Act Nurses And Midwives Union Of Kenya

Reference is drawn to your letter reference MK/JMK/12/2020 dated 7th October, 2021, received in our office on 21st October, 2021.

The Labour Relations Act, 2007 under section 12 (3) (b) states that, “The Registrar shall issue a certificate within thirty days of receiving an application unless- (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.”

You will agree that your name is sufficiently similar to the existing registered union of Kenya National Union of Nurses.

Further, Section 14 (1) (d) (i) of the Act provides that, “A trade union may apply for registration if 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.”

That the workers that you seek to represent are sufficiently represented by the registered union of Kenya National Union of Nurses whose mandate you have acknowledged and intimated in your letter under paragraph C. In addition, it is our contention that, midwives are also nurses.

In light of this, I regret to inform you that your application fails as it is statutorily barred.

Your Faithfully,

E.n Gicheha (mrs)

Registrar of Trade Unions

CC: Ephone Nyangena Oira &

Lukas Kinuthia Nyarara

Proposers, Nurses and Midwives Union of Kenya”

22. The main reason why the application for issuance of a certificate to the promoters of the NMU-K was that the name was sufficiently similar to the existing registered union, the Kenya Union of Nurses (KNUN). The refusal was fortified by quoting verbatim section 12 (3) (b) of the Labour Relation Act.
23. Section 12 of the Act provides that:-
 1. “No person shall recruit members for the purpose of establishing a trade union or employers’ organization unless that person has obtained a certificate from the Registrar issued under this section.
 2. An application for the certificate referred to in subsection (1) shall-
 - a. be signed by two persons who are promoting the establishment of the trade union or employers’ organization;
 - b. specify the name of the proposed trade union or employers’ organization; and
 - c. contain any other prescribed information.



3. The Registrar shall issue a certificate within thirty days of receiving an application unless-
 - a. the application is defective; or
 - b. the name of the proposed trade union or employers' organisation is the same as that of an existing trade union or employers' organisation or is sufficiently similar so as to mislead or cause confusion.”
24. Subsection (1) leaves no doubt that no person can recruit members for purposes of establishing a trade union before the person has obtained a certificate from the Registrar of Trade Unions under section 12 of the *Act*. Subsection (2) then sets out the procedure and the requirements for applying for the certificate including signing by two promoters of the proposed union, specification of the name of the proposed union, and any other prescribed information.
25. Subsection (3) provides in mandatory terms that the Registrar “shall” issue a certificate unless there is in existence either or both of the twin grounds for refusing a certificate, that is, if the application is defective or the name of the proposed trade union is the same as that of an existing trade union or is sufficiently similar so as to mislead or cause confusion.
26. As observed by the appellants, the refusal to issue a certificate was not due to a defect in the application. The letter is clear that the problem was in the name of the proposed union. It was described by the Registrar as being sufficiently similar to that of Kenya National Union of Nurses (KNUN). Under the cited law, the Registrar had the necessary discretion to refuse any application for issuance of a certificate to promoters if the name was sufficiently similar to that of an existing trade union like in this case.
27. It has not been shown that the said discretion was exercised without any legal or factual basis. Nor has it been demonstrated that the discretion was abused or exercised capriciously. I am satisfied that in refusing to issue the certificate to the appellants, the Registrar cited the reason for the decision. The reason cited, in my view was valid and justifiable. The name of the proposed trade union NMU-K is sufficiently similar to that of the 3rd Respondent, Kenya National Union of Nurses (KNUN). Consequently, I find and hold that the appeal lacks merits on that ground.
28. However, I must point out that the Registrar fell into error by citing the grounds for declining registration under section 14 of the Labour Relations Act while dealing with an application for certificate under section 12 of the *Act*. Citing of section 14 of the *Act* was therefore premature and had the effect of denying appellants and their target membership, the right to association and fair labour practices as guaranteed under Article 36 and 41 of the *Constitution* . I say so because one gets the impression that the appellant had been denied the option of getting an alternative name in order to apply for the certificate afresh. The citation of the grounds under section 14 of the *Act* by the Registrar give a death blow to the appellants' quest towards enjoyment of the rights and fundamental freedoms under Article 36 and 41 of the *Constitution* .
29. The court must correct that negative impression by observing that while dealing with an application for certificate under Section 12 of the *Labour Relations Act*, the Registrar does not have the power to close the door completely to the applicants. The Registrar has a duty to issue a certificate except if the application is defective or the name is the same or similar to another existing registered trade union.
30. Refusal to issue the certificate does not condemn the applicants to abyss but merely sends them back to the drawing board to do a better application that meets the legal threshold set by section 12 of the *Labour Relation Act*. Consequently, I find and hold that the appellants have the liberty to make a fresh



application for certificate under section 12 of the Act using another name for consideration by the registrar without going to the considerations which are relevant to an application for registration of the proposed trade union under section 14 of the Act.

Reliefs

31. I have already made a finding of fact that the refusal by the Registrar to issue a certificate to the appellants under section 12 of the Labour Relations Act was right because the name of the proposed union was sufficiently similar to that of KNUN and therefore the Registrar did not err. Consequently, the appeal is dismissed with no costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS 27TH DAY OF APRIL, 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

