



**Owuor & others ((Suing as the proposers of the proposed union)) v
Gicheha & another; Lidigu & 2 others (Interested Parties) (Appeal
26 of 2016) [2023] KEELRC 1390 (KLR) (16 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1390 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL 26 OF 2016
NZIOKI WA MAKAU, J
MAY 16, 2023**

BETWEEN

**MUDROCK OWUOR & OTHERS APPELLANT
(SUING AS THE PROPOSERS OF THE PROPOSED UNION)**

AND

**ELIZABETH N GICHEHA 1ST RESPONDENT
REGISTRAR OF TRADE UNIONS 2ND RESPONDENT**

AND

SEBASTIAN LIDIGU & 2 OTHERS INTERESTED PARTY

RULING

1. Pursuant to the directions of the Court made on March 8, 2023, parties were to file submissions on the issue of contempt as raised by the Appellants. In their Notice of Motion Application dated March 18, 2022, the Appellants ask the Court to cite the 1st Respondent who is the substantive holder of the 2nd Respondent, for Contempt of Court for deliberately disobeying Orders of the Court issued on May 4, 2018, commit her to civil jail and to fine her.
2. The Respondents in a Replying Affidavit dated June 21, 2022, averred that the Judgment of May 4, 2018 directed them to reconsider the Applicant's application under the provisions of section 12 of the *Labour Relations Act*. The Applicants assert that the Respondent wrote to the Applicant's Advocate on March 14, 2019 informing them that the National Labour Board was considering the registration of the proposed trade union. That however the term of the previous board members had expired and the process of reconstituting a new board was underway. That the Respondent was thus not in a position to reconsider the Applicant's application until the pending application before the Board was



- duly determined and considering there was already another certificate in place. Further, that by a letter dated January 21, 2022, the Respondent informed the Applicant that a certificate of registration had already been issued to a similar union, Kenya Union of Technical and Vocational Education Trainers (KUTVET), which had however not been registered as the proposed area of coverage was already represented by KUPPET. That the Applicant therein challenged the decision *vide* Kisumu ELRC Appeal No 12 of 2019 and the same was dismissed but was appealed against at the Court of Appeal.
3. It is the Respondents' position that in view of the pending Appeal at Kisumu Court of Appeal, the Applicant's application to register the proposed trade union cannot be acted upon as issuance of a certificate of registration may lead to conflict and violate the law. According to them, the matter is sub judice. That in view of the foregoing, the Respondent is not in contempt of the judgment delivered on May 4, 2018 and the Contempt Application should fail for lacking merit.
 4. In response to the Application, the 2nd Interested Party filed a Replying Affidavit averring that Jayne Misembe is not an interim Secretary General of KUTVET and is therefore not acting in good faith. He further avers there is an ongoing case in the Court of Appeal in Kisumu No COACA/E208/2021 concerning the same issue of registration of KUTVET and the matter is hence sub judice. He asks the Court to dismiss the application for want of jurisdiction to entertain the same issues that are before the Court of Appeal.
 5. Appellants'/Applicants' Submissions
The Applicants' position is that the 2nd Interested Party infringed on their rights when it came to patent rights in the Judgment dated 4th May 2018 and that despite this judgment, the Respondent and the 2nd Interested Party went on to institute another case in Kisumu and failed to disclose to the Appellants, the Kisumu ELRC and to this Honourable Court about the same, and the case was eventually dismissed in Kisumu on October 6, 2021. The Applicants further assert that before the Respondent was served with the Decree, the Attorney General wrote to her through a letter dated June 22, 2018 to approve the draft decree but she did not respond.
 6. It is the Applicants' stance that the Respondent has disobeyed the orders of this Court issued on July 17, 2019 for the reissuance of the Certificate of Recruitment and revocation of the Recruitment Certificate issued to the Interested Parties. That this Court issued an Order on May 4, 2018 compelling the Respondent to make a decision and communicate with the Appellants before July 31, 2019. That despite the said Order having been served upon the Respondent on November 4, 2019, she has deliberately disobeyed the same. The Applicant submits that the Respondents are in contempt for failing to comply with the Court's directives that the Respondent issues a Certificate of Registration to the Appellants (KUTVET), which Directives or Orders the Respondent have never appealed against for variation or setting aside.
 7. The Applicants submit that the 2nd Respondent is bound by the Constitution on all the decisions she makes pursuant to Article 2 of the Constitution. That the right to form and join a union of one's choice is recognized under Article 36 of the Constitution and the decision of the 2nd Respondent is a flagrant violation of this constitutional right to freedom of association. That registration had been unreasonably denied and dished out to the Interested Parties, who subsequently applied for registration while the Applicants' Appeal was pending before this Court. Furthermore, the right to a fair hearing before the refusal has been violated and that this decision was also made without due regard to Article 41 of the Constitution.
 8. They further submit that the statutory guides to the Registrar of Trade Unions in regard to the issuance of a certificate of establishment and subsequent registration are found in sections 12 and 13 of the Labour Relations Act, No 14 of 2007, Laws of Kenya. That thereat, the Respondent is specifically called



to issue a certificate within 30 days unless the application is defective or the name of the proposed Union is the same or similar to an existing union such that it can cause confusion. It is the Applicant's position that the Respondent in its letter of denial to issue a certificate, has not indicated that the application is defective or that the name is the same or similar to an existing union.

9. The Applicants submit that Courts have taken a liberal approach in the registration of trade unions and reversed the decisions of the Registrar not to register a trade union. That for instance in *Seth Panyako & 5 others v Attorney General & 2 others* [2013] eKLR, the Court took a positive step to register a trade union where there had been a delay by the registrar to issue a certificate of registration. They also rely in the authorities of: *Kenya Concrete, Structural, Ceramics Tiles, Wood Plys and Interior Designs Workers Union v Registrar of Trade Unions & another* [2013] eKLR; and *Japheth Anyira Agura & 6 others v Registrar of Trade Unions* [2014] eKLR.

10. The Applicants further submit that Courts have noted that the Registrar of Trade Unions ought to make proper inquiries before registering or refusing to register a union. That the Registrar has a duty to make decision based on materials place before her and to give justifiable reasons for her decision. That by refusing to issue the Appellants with a certificate, the Registrar has shut them out from exercising a chance to demonstrate the qualitative and quantitative aspects of the sufficiency of representation in this sector. They urge the Court to allow the contempt as pleaded.

11. Interested Parties' Submissions

The Interested Parties submitted on their Preliminary Objection which this Court already considered and rendered a Ruling on July 12, 2022. In general, the 1st, 2nd and 3rd Interested Parties submit that the issues in this suit are *res judicata* and that Jayne Misembe is moving the Court multiple times to the same end. They urge this Court, in observance of the doctrine of stare decisis, to strike out the suit for being a classic case of abuse of the Court's process and an affront to fair administration of justice by an overzealous Applicant out to irritate, harass and vex her opponents for her own selfish amusement.

12. The Respondents did not file submissions on the issue.

13. The pleadings and submissions of parties as well as the preliminary objection taken have been considered alongside the cited case law to come to this decision. The Applicant's application is one that seeks committal of the 1st Respondent who is the holder of the office in the 2nd Respondent. It is asserted that the said Respondents have declined, refused and or wilfully neglected to obey a Court order. In the matter before me, my brother Radido J. ordered the Respondents to consider the application for registration made by the Applicants. This decision is what is said to have caused the current impasse. The Court has considered the decision of Nduma J. which was given in Kisumu ELRC Appeal No 12 of 2019 reported as *Kepher Langi Oguwi (Suing on Behalf of Kenya Union of Technical and Vocational Education Trainers v Registrar of Trade Unions; Kenya Union of Post-Primary Education Teachers (KUPPET) (Interested Party)* [2019] eKLR where the Learned Judge held as follows:-

12. The decision by the Registrar of Trade Unions dated May 14, 2019 was to refuse to register the Appellant/Applicant, Kenya Union of Technical and Vocational Educational Trainers.

13. The decision by the Registrar was communicated to the Appellant/Applicant on May 17, 2019 according to the papers filed before court by the Appellant/Applicant.

14. The only recourse the applicant has which he has already done is to appeal the decision of the Registrar of Trade Unions.



15. The decision not to register the Appellant/Applicant Union is negative in nature. It therefore means that there is nothing for this court to stay pending the hearing and determination of the pending appeal.
16. The Application for stay of the decision of the Registrar of Trade Unions is therefore misconceived since the same is in capable of prevention in fact or in law.
17. Accordingly the application lacks merit and is dismissed.
14. A plain reading of the decision by Nduma J. suggests there was a duplicity in the suits before the Courts at Kisumu and Nairobi. Secondly, the court orders were obeyed by the Respondents who placed the matter for consideration. Thirdly, there was another proposed union that went the same route and was told there is coverage by KUPPET. This means there is nothing more for the Respondents to do having pronounced their decision which is the current position in compliance with the law on trade unions as well as the court orders given in this case.
15. Currently, the Court is advised that there is an appeal pending before the Court of Appeal at Kisumu. As such, there being an appeal and this matter being res judicata I cannot entertain applications on the matter as there has been a decision made at this Court. Any new decision may conflict with the decision of the Court of Appeal which would be a travesty in addition to being patently illegal. Once a final decision is made the parties need to move on. The application before me is dismissed with costs for being baseless, vexatious and otherwise an abuse of the court process. The costs shall be on the higher scale due to the persistence of the litigant Jayne Emisembe in disregarding court rulings on the matter.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF MAY 2023

NZIOKI WA MAKAU

JUDGE

