



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION NO. 51 OF 2019

BETWEEN

- 1. SAMUEL KING'ARA KABATI**
- 2. KEVIN MUKUNA MBUNDU [In their capacities as Officials and Promoters of the proposed KENYA AIR TRAFFIC CONTROLLERS UNION]ex-PARTE APPLICANTS**

VERSUS

- 1. THE REGISTRAR OF TRADE UNIONS**
- 2. THE HON. ATTORNEY- GENERAL RESPONDENTS**

Rika J

Court Assistant: Emmanuel Kiprono

GMLAW Advocates for the Applicants

Christine Oyugi, Principal Litigation Counsel for the Respondents.

JUDGMENT

1. In their Application dated 13th May 2019, the Applicants sought the following orders: -

I. The Application is certified urgent and heard *ex parte* at the first instance.

II. Leave be granted to the Applicants to apply for Judicial Review Orders for certiorari, bringing before this Court and quashing the decision made by the 1st Respondent on 6th February 2019 to disallow the Application by the Applicants for Certificate under Section 12 of the Labour Relations Act No. 14 of 2007, to recruit members for purposes of establishing the Kenya Air Controllers Union, a proposed Trade Union.

III. Leave be granted to the Applicants to apply for Judicial Review Orders for mandamus directing and compelling the 1st Respondent to issue the Applicants with a Certificate under Section 12 of the Labour Relations Act No. 14 of 2007, to recruit members for purposes of establishing the Kenya Air Controllers Union, a proposed Trade Union.

2. This Application for Leave was granted by Hon. Byram Ongaya J, on 14th May 2019.

3. The substantive Notice of Motion was filed on 24th May 2019, supported by the Grounds listed on the face of 2 Applications; the Affidavit of the 1st Applicant earlier sworn on 13th May 2019; and a Statutory Statement of the same date. The orders sought in the substantive Notice of Motion, are for certiorari and mandamus, as detailed in the Application for leave.
4. In a capsule, the Applicants state they are qualified Air Traffic Controllers, presently employed by the Kenya Civil Aviation Authority.
5. They are not unionized, because there is no Trade Union currently registered, capable of effectively representing their industry.
6. They, with other Air Traffic Controllers resolved to register Kenya Air Traffic Controllers Union. They applied through their Advocates, to the 1st Respondent for a Certificate under Section 12 of the Labour Relations Act. The Application is dated 21st January 2019.
7. The 1st Respondent replied on 6th February 2019 declining Application. She justified her decision on the following grounds: -
 - I. The cadre of workers sought to be represented by the Applicants' proposed Trade Union, are already sufficiently represented by 2 other Trade Unions in the aviation sector.
 - II. Those 2 other Trade Unions are mandated to represent among others, workers manning aerodromes, airports, landing strips, and aircrafts, and ground handling.
 - III. The Labour Relations Act provides that the proposed Trade Union would only engage in a sector where no other Union exists.
 - IV. Recruitment by a proposed Trade Union in a sector already represented by another Trade Union, is statutory barred.
8. The Application is opposed through the Affidavit of the 1st Respondent, sworn on 10th January 2019. She confirms that the Applicants applied for Certificate under Section 12 of the Labour Relations Act, which she declined on the grounds stated in her reply above.
9. She explains that Section 12 of the Labour Relations Act, must be read with Section 14 of the same Act which states 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 which the Applicants seek registration.
10. The 1st Respondent has discretion in issuing Certificate under Section 12. She supports this position on authority of the **Court of Appeal of Kenya, in Civil Appeal No. 19 of 2016, Charles Salano & 9 Others [Promoters of Kenya Supermarkets Workers Union] v. The Registrar of Trade Unions & Another**. It was the view of the Court of Appeal in the decision above, that grant of Certificate under Section 12, is not automatic. If it was meant to be so, the Court of Appeal held, there would be a proliferation of Trade Unions covering groups with similar interests. The Court of Appeal found limitation of the Appellant's right under Article 26 and 41 of the Constitution to be reasonable and justifiable in an open and democratic society.
11. The 1st Respondent further argues that in the E&LRC Judgment, **Paul Mungai Muiruri & 5 Others v. The Registrar of Trade Unions [2018] e-KLR**, the Court declined to order registration of the proposed Trade Union, because there exists 2 other Trade Unions in the aviation sector.
12. Lastly, the 1st Respondent submits that her decision was made on 6th February 2019. The Application before this Court was filed on 14th May 2019. Section 30 of the Labour Relations Act, provides that persons aggrieved by the decision of the 1st Respondent, may appeal to the Court against such decision within 30 days. The Applicants did not file an Appeal, and even if their Application was to be deemed an Appeal, it was not filed within the stipulated time. The 1st Respondent prays the Court to dismiss the Application.
13. Parties agreed on 11th March 2021, to proceed by way of Written Submissions. They confirmed filing of Submissions on 14th October 2021.
14. The Submissions filed by the Respondents state that they relate to the Application by the Applicants dated 13th May 2019. The Counsel for the Respondents similarly asked the Court at the last mention, in the absence of the Applicants, to render a Ruling with respect to the Application dated 13th May 2019. The Court indicated that Ruling would be delivered on 28th January 2022.
15. This position is erroneous. Ruling with respect to the Application dated 13th May 2019 issued on 14th May 2019. The Applicants subsequently filed their substantive Application dated 23rd May 2019, on 24th May 2019. Their Submissions dated 31st May 2021 on record, relate to that Application. The matter comes up for Judgment, on the substantive Motion, not a Ruling as the Court was misled to record by the Respondents, in the absence of the Applicants.

The Court Finds: -

16. Section 12 of the Labour Relations Act states 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' organization is the same as that of an existing trade union or employers' organisation, or is sufficiently similar so as to mislead or cause confusion.

[4] A certificate issued under subsection [3] shall specify that-

[a] the promoters may undertake lawful activities in order to establish a trade union or employers' organisation; and,

[b] an application for the registration of the trade union or employers' organisation shall be made to the Registrar within six months of the date of issue of the certificate.

[5] The Registrar may withdraw a certificate issued under this section if the Registrar has reason to believe that –

[a] the certificate was obtained by fraud, misrepresentation or as a result of mistake; or,

[b] any person has undertaken an unlawful activity, whether in contravention of this Act, or any other law, on behalf of the proposed trade union or employers' organisation.

17. The Applicants had not reached the point where, they were required to apply for registration as a Trade Union, which is under Section 14 of the Labour Relations Act.

18. Certificate issued under Section 12, must be regulated strictly under the comprehensive provisions contained in Section 12.

19. There was no justification whatsoever, in the 1st Respondent importing section 14 of the Act, in exercising her mandate under Section 12. The 2 provisions of the Labour Relations Act, are separate and serve separate objectives. Section 12 is on issuing a Certificate, to enable persons who are desirous of forming a Trade Union, and who would probably be restricted in their association by such laws, as prohibit illegitimate trade union activities, to meet, and craft their Trade Union constitution undisturbed. It is a preparatory Certificate, which is important to the exercise of Article 41 constitutional rights – to form, join and participate in the activities and programmes of a Trade Union or Employers' Organisation. How will Trade Unions be formed, if promoters are curtailed from freely gathering and associating at the very beginning?

20. Section 14 only applies once the persons desirous of registering a Trade Union, have presented their application for registration, with their constitution to the 1st Respondent.

21. The 1st Respondent reads the constitution and other documents presented by the promoters of the proposed Trade Union, and exercises her mandate, accepting or declining registration, under Section 14 of the Act.

22. The Court agrees with the Respondents, that grant of Certificate under Section 12 is not automatic. The limitations are however to be read from Section 12 entirely, not from other provisions that regulate Trade Unions. Those limitations or conditions are specified under Section 12. The 1st Respondent is allowed to withdraw the Certificate on specific grounds under Section 12.

23. The matters the 1st Respondent took into account, in denying the Applicants the Certificate, were properly matters to be considered under Section 14 of the Act, after registration is sought.

24. If Parliament intended that the 1st Respondent considers the presence of other Trade Unions in the sector which an Applicant Trade Union seeks to represent, in grant of Certificate under Section 12, then the 2 provisions would have been merged into 1 provision. Instead, Parliament enacted 2 separate provisions, which serve separate objectives.

25. A Certificate issued under Section 12 does not mean the proposed Trade Union has been registered, or that it is likely to be registered; it simply allows persons to gather and engage in pre-registration trade union activities, without the risk of falling afoul of the law on illegal organisations, illegal gatherings and illegitimate trade union activities.

26. The Court does not therefore agree with the interpretation of the law on grant of Certificate under Section 12, given by the 1st Respondent, and similarly does not agree with the interpretation of the Court of Appeal, relied upon by the Respondent, in refusal to grant the Applicants the Certificate. Grant of that Certificate would not lead to any proliferation of Trade Unions, because the Certificate does not grant the Applicants the status of a registered Trade Union. **Paul Mungai Muiruri & Others v. The Registrar of Trade Unions [2018] e-KLR**, was an Appeal against the 1st Respondent's refusal to register the Appellants as a Trade Union. It concerned Section 14 of the Labour

Relations Act, not Section 12.

27. The 1st Respondent pre-empted the application for registration which was in law, wrong. She considered matters she was not called upon to consider, under Section 12 of the Act. She denied the Applicants their right to congregate and participate in legitimate trade union activities, eliminating the potential for legitimate birthing of a Trade Union. She curtailed the Applicants' fundamental freedom of association. She pre-empted exercise of her obligation, in considering registration of a Trade Union, under Section 14 of the Labour Relations Act.

28. What were the Applicants to do, after denial of the Certificate?

29. Section 30 of the Labour Relations Act states: -

“ Any person aggrieved by a decision of the Registrar made under this Act may appeal to the Industrial Court [E&LRC] against that decision, within thirty days of the decision.”

30. The Applicants chose not to make an Appeal as provided for in the above law. The decision was made on 6th February 2019. 30 days ended on 6th March 2019. There was no Appeal.

31. It was only 3 months after the decision, on 14th May 2019, when the Applicants moved to have the decision of the 1st Respondent reviewed.

32. They cite Rule 7[2] of the E&LRC [Procedure] Rules, 2016, as allowing them to file this Application.

33. The Court does not think that the Rule, or Judicial Review Proceedings as a whole, are meant to be an escape route, for a Party who has clearly failed to adhere to the statutory procedure, governing his dispute.

34. The dispute herein is about the Labour Relations Act. It relates to the processes of certification and registration of Trade Unions, under Sections 12 and 14 of the Labour Relations Act, and the decision of the 1st Respondent. The Applicants themselves cite the Labour Relations Act at length. They do not explain why they did not appeal the decision of the 1st Respondent, as required under Section 30 of the Labour Relations Act. Their Application for Judicial Review, bears the hallmark of circumvention. The Applicants intend to circumvent a provision of the Labour Relations Act they failed to meet, after their certification was declined- Section 30 of the Labour Relations Act.

35. While the Court agrees with the Applicants' submissions, that the 1st Respondent was wrong in declining to issue them Certificate under Section 12, the Court must decline their Application for 2 reasons.

36. One, there is a decision of the Court of Appeal on the subject matter, which the Court does not agree with, but which in law, the Court is bound to apply.

37. Two, the Applicants ought to have presented an Appeal within 30 days of the decision made by the 1st Respondent, and not an Application for Judicial Review, 3 months after the decision.

IT IS ORDERED: -

a. The Application for prerogative orders of certiorari and mandamus, filed by the Applicants herein, is declined.

b. No order on the costs.

DATED, SIGNED, AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 28TH DAY OF JANUARY 2022.

JAMES RIKA

JUDGE