



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA

ELRC APPEAL NO. E014 OF 2021

KENYA NATIONAL OF UNION OF

DOMESTIC WORKERS.....APPELLANT/APPLICANT

VERSUS

REGISTRAR OF TRADE UNIONS.....1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

KENYA UNION OF DOMESTICE, HOTELS,

EDUCATIONAL INSTUTIONS, HOSPITALS AND

ALLIED WORKERS (KUDHEIHA).....3rd RESPONDENT

J U D G M E N T

1. The Appellant filed Notice of Appeal, dated 5th October 2021 against the decision of the Registrar of Trade Unions rejecting registration of its resolution of 14th September 2021 and 15th August, 2021.
2. The Appeal is based on grounds under the Notice of Motion dated 5th October 2021.
3. The Notice of motion seeks the following reliefs:-
 - i. Spent
 - ii. Spent
 - iii. Spent
 - iv. That this Honourable court be pleased to grant declaratory orders quashing the direction of the 1st Respondent dated 16th September 2021 as an infringement of the Appellant's enjoyment of Constitutional rights enshrined in Articles 36, 41 and 47 of the Constitution 2020 and Section 4 and 27 of the Labour Relations Act 2007.
 - v. That this Honourable court be pleased to further order that Registrar of Resolutions dated 14th September 2021 does not in any way amount to contempt of court in award in Bungoma ELRC Appeal No. 1 of 2018.
4. The grounds of the appeal under the motion in summary are that on 30th May, 2019 the Court issued orders directing the 1st Respondent to register the Appellant by reviewing her Constitution to cover representation of domestic workers employees in private homes and not in any commercial and or public establishment whether designated as homes or otherwise in Bungoma ELRC Appeal No. 1 of 2018. That upon registration pursuant and in compliance with the Judgement the Appellant convened a special conference on 15th August 2021 and among other resolutions were made to amend the Appellant's constitution which changes were forwarded to the 1st Respondent on 24th August 2021. The 1st Respondent requested for further detailed resolutions and the Appellant sent another letter dated 14th September 2021 with detailed resolutions on the changes in the name and constitution and duly paid for the registration of the resolutions. On the 16th September 2021 the 1st Respondent wrote to the Appellant rejecting the resolutions as follows:-

“ We have received your letter Reg 2 /KNUODOW/MM/RT- 8/201 together with the resolutions containing details of the changes passed over. (Read change of name and amendment of the constitution and rules).

You will note that in the year 2019, the Employment and Labour Relations Court at Bungoma, it was ordered that your union restrict its representation to domestic workers employed in private family houses and not in any commercial and or public establishments whether designated as homes or otherwise. That court also ordered the Registrar to review the Union Constitution to ensure this restriction is adhered to. You will agree that any attempt to change the Constitution to expand the scope of representation beyond what the court ordered will be tantamount to disobedience of the order and thus contempt of a lawful court order”.(Annexure 13 of the Applicant’s bundle at page 147).

5. The Appellant relies on the supporting affidavit of Moses Mwangi Shivayilu sworn on the 5th October, 2021. The Appellant contests the Application of judgment in Bungoma ELRC Appeal No. 1 of 2018 by the 1st Respondent in rejecting their proposed changes /resolutions. The court will consider the implication of the judgment and whether any amendments to expand scope by Appellant amounts to contempt of court as stated by the 1st Respondent.

6. The Appeal and Application are opposed.

7. The 1st and 2nd Respondents filed replying affidavit sworn by Mrs. E.N. GICHEHA, the Registrar of Trade Unions, sworn on the 8th November 2021 and in summary states that Bungoma ELRC Appeal No. 1 of 2018 was appeal against 1st Respondent appealing against her decision to register the Trade Union. That the said court upon hearing appeal delivered its Judgement dated 30th May, 2021, allowed the appeal and ordered the Appellant to be registered but restricted its representation to domestic workers employed in private homes and not in any Commercial and/or public establishments whether designated as workers or otherwise and further that the Constitution of the Appellant to be reviewed by the 1st Respondent before registration is done to ensure the restriction is adhered to . Pursuant to the Judgement the 1st Respondent registered the Appellant . The 1st Respondent avers that the name of the Appellant fundamentally changed and is different from what was ordered by the court to be registered in judgement of 31st May, 2019.

8. That instead of the Appellant following the 1st Respondent’s advice in her letter of 16th September 2021 they filed the instant appeal and application. That the 1st Respondent has not made a decision to reject or approve the amendments but only advised the appellant to relook at the amendments and therefore this appeal is prematurely before the court. That the Application is improper as it seeks final orders at interlocutory stage and which orders can only be granted after hearing of appeal and therefore the court should disregard the same. The Court notes that the application is determined together with the appeal.

9. The 1st Respondent further states that the expanded scope contained in the proposed amended Constitution of the Appellant is already covered by other registered trade unions which may result in trade wars as they will compete for membership and further there is not nexus between the expanded scope and scope of domestic workers. That the resolutions dated 15th September 2021 and change of Appellant name ought not be registered in tandem with decision in Bungoma ELRC APPEAL NO.1 OF 2018 as it seeks to expand the scope of the Appellant to cover persons employed in medical training institutions and Garment staff yet the judgment limited the scope to Domestic workers employed in private homes and the said judgment was very specific on the scope of the Appellant.

10. As stated earlier the court will consider the said judgment and makes it determination on its application to the appeal.

11. The 3rd Respondent, Kenya Union of Domestic Hotels, Educational Institutions Hospitals and Allied Workers (KUDHEIHA) was allowed on application to join the appeal and filed replying affidavit by Albert Njeru Obed sworn on 8th November 2021 opposing the application. In summary its case is that the amended Constitution sought to be registered is a copy and paste of its constitution and attempts to encroach into a section which is fully and sufficiently represented by the 3rd Respondent, an existing registered trade Union which has recognition agreements in the Sector. That the Appellant seeks to recruit and represent employees who are represented by the 3rd Respondent.

12. That there is serious conflict of interest in that the Chairman of the Appellant also doubles up as an employee of the 3rd Respondent. That the proposed amendments will set up the Appellant as arrival of the 3rd Respondent and that the prayers sought are contrary to judgement of Judge Nduma of 31st May 2019.

13. The Appellant filed further Affidavit in response to 1st Respondent’s response and avers that its appeal and application are brought under Section 30 of the Labour Relations Act and Rule No. 8 and 1st schedule 1 of the ELRC (procedure Rules) 2016 Section 30 of the Labour Relations Act states that “ Any person aggrieved by a decision of the Registrar made under this Act may appeal to the industrial court against the decision within 30 days of the decision.”

14. The Appellant states that the 1st Respondent was statutory obliged under Section 27 (4) of the Labour Relation Act 2007 to Gazette the Resolutions giving 21 days to invite any objection which she did not do but went straight to reject the expansion of scope as per Section 27 (9) of the Act for biased reasons only known to her. On this submission, the Court finds that that the letter dated 16th September 2021 by the 1st Respondent does not amount to rejection of the resolutions but is a call for compliance with the judgment of the court.

15. The Appellant filed a further affidavit in response to the 3rd Respondent’s response vide affidavit sworn by Moses Mwangi on the 15th October 2021. The Appellant disputes the averments by 3rd Respondent and most relevant to the dispute states in paragraph 13 that the 3rd Respondent cannot in anyway purport that this court in exercise of its mandate by issuing judgment in the present appeal would be amending orders issued on 31st March, 2019 by Justice Nduma in Appeal No. 1 of 2018 which order were fully complied with. The Honourable court

can only be persuaded but not bound by its own decision as a matter of precedence.

16. The 1st interested party is the Tailors & Textile workers Union who filed replying affidavit dated 22nd November, 2021 sworn by Rev. Joel kandie Chebii who among others states that the interested party exists form organization of all workers employed in the Tailoring, Textile and related industries and annexed its constitution. The interested party states there is no ambiguity in the orders in ELRC Bungoma Appeal No. 1 of 2018 and avers that the rejection of the changes by 1st Respondent is in compliance with decision of court. That there has been attempts by Appellant to interfere with its members leading it to protest to the Ministry of Labour and Social protect and a warning by the Ministry to Appellant to desist (CJKC a and b, 5 (a) and b).

17. The 1st Interested party further states that the action of the Appellant to demand to change its name and constitution without seeking the interpretation of the Judgement in Bungoma ELRC Appeal No. 1 of 2018 which created it and spelt its scope is an act of disobedience and conceptional of court. As stated earlier the court will in this decision determine the meaning of the impugned judgement of justice Nduma and its effect.

18. The 2nd to 22nd interested parties were enjoined to the appeal and vide affidavit of Danvas Mayaka Ohanga and Brian Johanna Riaroh sworn jointly by the two on 31st January 2022 aver that the 21 interested parties are employees of Kenya Medical Training college, United Aryan EPZ Ltd, African Apparel East Africa Ltd, Royal Garments Industries EPZ and New wide Apparel EPZ. That the 21 are just a fraction representing over 2000 employees at Kenya Medical Training College and 5000 Workers at various textile/garments companies allegedly dissatisfied with services of 3rd Respondent and 1st interested party. The state they have withdrawn membership from the 3rd Respondent and 1st interested party for want of sufficient representation and attaches KUDHEIHA KMTC CBA which they challenged its registration in court . In summary they support the appeal.

19. The Appeal and application are jointly canvassed by way of written submissions pursuant to directions of the court.

20. The Appellant written submissions are dated 31st January 2022 by Moses Mwangi, the Appellant. The 2nd to 22nd interested written submissions are dated 31st January 2022 by Ngeresa and Okallo Associates Advocates.

21. The 1st and 2nd Respondents' written submissions are dated 4th February 2022 drawn by Hon. Attorney General , Senior State Counsel Gilbert Tarus.

22. The 3rd Respondent's written submissions are dated 29th November 2021 and drawn by Nchoe Jaoko & Company Advocates.

DETERMINATION

23. The Judgement is on the appeal dated 5th October 2021 against the decision of the 1st Respondent on its resolution of the Appellant of 14th September 2021 and 15th August 2021. The court considered that the Appeal is based on the grounds under the Notice of Motion dated 5th October 2021.

24. The Appellant identified 4 issues for determination in its submissions. The court looked into the same. The other parties did not identify specific issues for determination. The court having considered the appeal and the pleadings of all parties is of considered opinion that the issues for determination in the appeal are as follows:-

(a) Whether the resolutions by the Appellant of 14th September 2021 and 15th August, 2021 are in contempt of the judgment of Justice Nduma in Bungoma ELRC APPEAL NO. 1 of 2018.

(b) Whether the refusal to register the Appellant's resolutions by 1st Respondent is violation of the Appellants prospective member's rights as provided for under Article 36 and 41 of the Constitution of Kenya & Section 27 of the Labour Relations Act.

(c) Whether the employees of medical training colleges and Garments Industries are sufficiently represented by the 3rd Respondent and 1st Interested party .

(d) Who bears costs of appeal.

Whether the resolutions by the Appellant dated 14th September, 2021 and 15th August 2021 are in contempt of the Judgement in Bungoma Appeal No. 1 of 2018.

25. It is the considered opinion of this court this is an important issue which will determine the fate of the instant appeal. The impugned decision (1st Respondent's annexure "GG4 (B)" is letter dated 16th September 2021 . The letter is addressed to the General Secretary Kenya National Union of Domestic workers(Appellant) and titled " The Labour Relations Act Change of name and amendment of constitution and Rules' and states, "*We have reviewed your letter Reg 2/KNUDOW/MM/RT – 8/24 together with the resolutions containing details of the changes passed over the above subject matter. You will note that in the year 2019 at the Employment and Labour Relations Court at Bungoma it was ordered that your Union restrict its representation to domestic workers employed in private family homes and not in any Commercial and or Public establishments whether designated as homes or otherwise. That the court also ordered the Registrar to review the Union Constitution to ensure this restriction is adhered to. You will agree that any attempt to change the constitution to expand the scope of representation beyond what the court ordered will be tantamount to disobedience of the order and this is contempt of lawful court order. In light of this, we are open to reviewing the rest of the amendments to the Union's constitution and rules subject that the proposed amended*

constitution furnished to this office strictly complies with the order in ELRC APPEAL NO. 1 of 2018 at Bungoma on 31st May, 2019. Please comply to enable us proceed with the rest of the amendments. “ signed Yours faithfully, EN. GICHEBA (Mrs) Registrar of Trade Unions”.

26. The 1st Respondent stated that the instant appeal is premature as she has not made a decision on the matter and instead of compliance with her directions the appellant rushed to court. From the reading of the letter, the court agrees that no final decision had been made on the resolutions but also notes that the 1st Respondent stated that the proposed amendments were outside the scope of judgment in Bungoma ELRC APPEAL NO. 1 of 2018.

27. The background of the said judgment is that the 1st Respondent had rejected application of registration of the Appellant on basis that the 3rd Respondent represented the sector. The court in allowing the appeal stated “for the purposes of this appeal and the registration of the proposed union, the constitution of the proposed union shall be limited to only “ domestic works in private house holds”. This restriction shall remove possibility of conflict with other cited unions (which included the 3rd Respondent) herein by the Registrar of Trade Unions as the reason by she refused to register the Union. The court commends the role of KUDHEIHA for championing ILO Convention No. 189... on protection of domestic workers. This is the reason why the court is of considered view that with the many woes experienced by domestic workers all over the world which woes are specific to domestic workers in private household, the idea of a specific union for private house hold domestic workers has come of age and it is embraced by the court.”(emphasis given)

28. The court in the foregoing decision in its final order allowing the appeal stated:-

‘(b) The National Union of Domestic Workers is to restrict representation to domestic workers employed in private houses and not in any commercial and or public establishment whether designated as homes or otherwise. The constitution of Appellant to be reviewed before registration is done to ensure this restriction is adhered to.’

29. The Appellant submits that it complied with said court order and amended its constitution and got registered. That the compliance with the Judgement renders the court functus officio in Bungoma ELRC APPEAL NO. 1 OF 2018 and relies on the decision in the case of *Jersey Evening Post Ltd- VS- AL Thani* (2002 JLR 542 at 550) where in part court states that the purpose of doctrine (functus officio) is to provide finality. Once proceedings are finally concluded the court cannot review or alter its decision , any challenges to its ruling must be taken to higher (sic court) if the right is available. In further cited case by Appellant of *Civil Appeal No. 99 of 2016 ICEA Hon. General Insurance Co. -vs Julious Nyaga Chomba cited in EP Nos 3,4 & 5 Raila Odinga & Others -vs IEBC & Others* (2013) eKLR cited with approval excerpt from Article by Malan Pretorius in “ The Origins of the functus Officio doctrine with specific reference to its application in administrative law” (2005) 122 SALJ 832 were it reads in part:- “ *The Principle that once such a decision has been given is, subject to any right of appeal to a supreme body or functionary, final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.*”

30. The appellant submits that the 1st Respondent cannot abrogate her duties by hiding under such a decision whose judgment and orders have been perfected and brought to finality . That her reference to the BungomaELRC APPEAL No. 1 of 2018 is not only fair fetched but an attempt to rank court precedence above the Constitution of 2010. Is that so?.

31. The court finds that the submission on functus officio doctrine in the instant case irrelevant. That court has not been asked to review the said decision or re open the case. The decision was implemented and that is why the Appellant is a registered trade Union. Indeed the said decision by my brother Justice Nduma is the mother of the Appellant. Without the decision the Appellant would not exist. That decision remains the foundation of the existence of the Appellant. The said decision defined the scope of the Appellant. The said decision is binding on the Appellant and the Respondent as far as the registration constitution and any future amendments of the Appellant is concerned. The court directed the 1st Respondent to review the constitution of the Appellant to ensure compliance with the restricted scope. A year or so down the line upon registration the Appellant now states the said decision having been perfected is no longer operational and it can thus amend the constitution to expand its scope to other sectors of medical colleges and garments as indicated in its resolutions. Applying the decision in Bungoma ELRC APPEAL 1 OF 2018 the appellant cannot be allowed to do that.

32. Section 27 (5) states that the Registrar may approve a change of name or the constitution of the applicable requirements of registration of a trade union are met. This means there is a close nexus between Section 14 of the Labour Relations Act on registration of unions and Section 27 on the change of name or constitution of trade unions .

33. It is the considered opinion of this court that the restriction imposed on scope of Appellant in the Bungoma ELRC Appeal No. 1 of 2018 by Justice Nduma remains binding on the Appellant and the 1st Respondent. Only the court of Appeal or high court may remove the restriction. It is also the opinion of the court that the constitution of the Appellant includes any amendments which must consistent with the scope imposed as a condition for the Appellant’s registration in the decision of the court in Bungoma ELRC Appeal No. 1 of 2018.

34. It is also the finding of the court that the Appellant upon the conditional registration has contemptuously proceeded with unrestrained approach to encroach on other sectors and or workers already covered by the 3rd Respondent and the 1st interested party. This the court finds to be contemptuous of the decision by my brother Justice Nduma in Bungoma ELRC Appeal no. 1 of 2018

35. To that extend the court finds merit in the contents of the letter by the 1st Respondent dated 16th September 2021. The Appellant in purporting to expand its scope beyond the demarcated area in Bungoma ELRC Appeal No. 1 of 2018 is acting in contempt of the said order. The said order is law and binding having not been overturned by a higher court.

Whether the refusal to register the Appellants resolutions by 1st Respondent is violation of the Appellants prospective members’ rights as provided for under Article 36 and 41 of constitution and Section 27 of the Labour Relations Act

36. The appellant submits that article 20- provides for the application of bill of rights and cites as follows:-

“(1) The Bill of Rights applies to all law and binds all State organs and all persons.

(2) Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.

(3) In applying a provision of the Bill of Rights, a court shall—

(a) develop the law to the extent that it does not give effect to a right or fundamental freedom;

and(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

(4) In interpreting the Bill of Rights, a court, tribunal or other authority shall promote—

(a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and

(b) the spirit, purport and objects of the Bill of Rights.”

37. The Appellant submits that the import of articles 36 and 41 of the constitution is that any worker has fundamental right and freedom to choose which union and organization to associate with in an open and democratic society. The court finds this submission to be misplaced. The decision to join a union is informed by the work of a worker and is about representation of workers in a sector. For example, why would a worker in commercial garment sector join the Appellant who is registered to represent domestic workers in households? Such a worker cannot then claim their right under articles 36 and 41 have been infringed. The claim would not be reasonable.

38. The 1st and 2nd Respondents submit that the Appellant’s rights under Article 36 and 41 (2) of the Constitution are subject to Limitation under Article 24 of the Constitution and the 1st Respondent’s decision to refuse the Appellant’s resolution of 14th September 2021 was justifiable limitation of the Appellants’ rights and made pursuant to court judgement in Bungoma ELRC Appeal No. 1 of 2018 and secondly the proposed constitution subject sought to represent was sufficiently represented by other unions and further the proposed changes did not seek to represent a specific sector but sought to add other sectors to its already registered union. To buttress its submission the 1st and 2nd Respondent rely on decision in *Kenya Public Schools Non – Teaching Staff (KEPUS NTESU) -VS- Registrar of Trade Unions & Another* where it was held :-

“ It is therefore inappropriate to introduce constitutional amendments in what is purely are policy and administrative issues. Indeed Articles 36 and 41 of the Constitution read together protects the freedom to form and join the trade union of ones choice. However the exercise of this freedom is not absolute. It must be exercised in cognizance and conformity with the policies and best practices in the Labour movements. Limitation of the right to form and join a Union of one’s choice in recognition of policies and best practices which have been tested over time is reasonable and justifiable in opine and democratic society”.

39. The court adopts the above decision with approval save to add that is not open to this court to amend the decision in Bungoma ELRC APPEAL NO. 1 OF 2018 and allow expansion of the scope of the Appellant. The court finds no basis of the allegation of violation of Articles 36 & 41 of the constitution of the alleged prospective members in the letter dated 16th September 2021 by the 1st Respondent.

Whether the employees of medical training colleges and garment Institutions are sufficiently represented by the 3rd Respondent and the 1st interested party.

40. The court finds this to be an academic question for the simple reason that it was not an issue in the letter dated 16th September 2021 which was the basis of the appeal. It is not an issue ripe for determination by this court. It is for that reason the court will not delve on the submissions by the parties under this issue.

CONCLUSION AND DISPOSITION

41. The court holds that the appealed decision of the 1st Respondent contained in letter dated 16th September 2021 to be consistent with the decision /Judgement of the court in Bungoma ELRC Appeal No. 1 of 2018 which restricted the scope of the Appellant . The said judgement is law and binds all the parties. The holds that the Appeal dated 5th October 2021 has no merit and is dismissed together with the supporting motion therein.

Each party to bear own costs in the Appeal.

DATED , SIGNED AND DELIVERED AT BUNGOMA THIS 21ST DAY OF APRIL, 2022

J. W. KELI

JUDGE

IN THE PRESENCE OF :-

Ms. Wesonga – C/A

For Petitioner- Mr.Isaac Munahe

1st and 2nd Respondent- Mr, Tarus, Senior State Counsel

3rd Respondent- Mr.Jaoko Advocate

2-22nd Interested Parties- Mr. Lungwe Advocate h/b Ngeresa Advocate