



Kenya Concrete, Structural, Ceramic Tiles, Wood Plys and Interior Design Workers Union v Registrar of Trade Unions, Ministry of Labour and Social Protection; Attorney General (Interested Party) (Miscellaneous Application E090 of 2022) [2022] KEELRC 12745 (KLR) (30 September 2022) (Judgment)

Neutral citation: [2022] KEELRC 12745 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E090 OF 2022**

SC RUTTO, J

SEPTEMBER 30, 2022

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI & PROHIBITION AND IN THE MATTER OF: ARTICLE 41(4) THE CONSTITUTION OF KENYA, 2010 AND IN THE MATTER OF: SEC. 27 OF THE LABOUR RELATIONS ACT NO. 14 OF 2007 LAWS OF KENYA AND IN THE MATTER OF: KENYA CONCRETE, STRUCTURAL, CERAMIC TILES, WOOD PLYS AND INTERIOR DESIGN WORKERS UNION AND IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT BETWEEN KENYA CONCRETE, STRUCTURAL, CERAMIC TILES, WOOD PLYS AND INTERIOR DESIGN WORKERS UNION

BETWEEN

KENYA CONCRETE, STRUCTURAL, CERAMIC TILES, WOOD PLYS AND INTERIOR DESIGN WORKERS UNION APPLICANT

AND

REGISTRAR OF TRADE UNIONS, MINISTRY OF LABOUR AND SOCIAL PROTECTION RESPONDENT

AND

ATTORNEY GENERAL INTERESTED PARTY

JUDGMENT

1. Before I delve into the merits of the case, I find it imperative to address the issue of intitlement of the application herein. From the record, it is crystal clear that this is a judicial review application brought pursuant to sections 8 and 9 of the Law Reform Act and order 53 rules 3(1) and 3 of the Civil Procedure Rules.



2. In regards to the form of judicial review applications, once leave is granted by the court, the applicant is the Republic while the initial applicant in the chamber summons application becomes the *ex parte* applicant. Therefore, the substantive motion ought to be brought in the name of the Republic as opposed to the person seeking orders against the impugned order.

3. Such was the determination by Ringera, J (as he then was) in the case of [*Jotham Mulati Welamondi vs The Electoral Commission of Kenya Bungoma*](#) [2002] eKLR, where the learned Judge reckoned thus: -

“In *Farmers Bus Service And Others V The Transport Licensing Appeal Tribunal* (1959) EA 779, the East African Court of Appeal held that prerogative orders are issued in the name of the crown and applications for such orders must be correctly intitled. On Kenya's assumption of Republican status on December 12, 1964, the place of the crown in all legal proceedings was taken by the Republic. Accordingly, the orders of certiorari, mandamus or prohibition now issue in the name of the Republic and applications therefor are made in the name of the Republic at the instance of the person affected by the action or omission in issue. In the premises, the proper format of the substantive motion for mandamus would have been

“Republic..... applicant

V

The Electoral Commission Of Kenya.....respondent

Ex Parte

Jotham Mulati Welamondi”

4. In the instant case, the motion application has not been brought in the name of the Republic but rather in the name of the applicant in the chamber summons application. It is therefore evident that the application is improperly intitled.

5. Be that as it may, I will follow the holding of the Court of Appeal in the case of [*Republic vs Charles Lutta Kasamani & another ex parte Minister for Finance & Commissioner of Insurance as Licencing and Regulating Officers*](#) [2006] eKLR where it was determined as follows: -

“Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment. This court said so in *Dipak Panachod Shah & Another Vs The Resident Magistrate Nairobi and the Attorney General - Civil Application NAI 81/00 (UR)*.

Is the form of title to the appeal as adopted by the Attorney General in this matter defective or irregular? We think not, as we find that it substantially complies with the guidelines set out by this court. “

6. The above determination was also in line with the court's holding in the case of *Farmers Bus Service and Others vs The Transport Licensing Appeal Tribunal* [1959] EA 779.

7. Pursuant to article 159 (2) (d) of the [*Constitution*](#), this court is enjoined to administer justice without undue regard to procedural technicalities. In my view the defect in form in the application does not render it fatally defective as the same do not affect its substance.

8. In the circumstances, i will proceed to determine the application on its merits.



9. As stated herein, the motion which is brought under section 8 and 9 of the Law Reform Act and order 53 rules 3(1) and 3 of the Civil Procedure Rules was filed pursuant to the court's leave on February 15, 2022 and seeks the following orders *inter alia*: -
 - i. An order of certiorari do issue to remove into this honorable court and quash the decision of the respondent of (sic) refusal to register the changes to the applicants' registered constitution and rules which decision is contained in the letter Ref: ML&SP/TU/171/2/172 dated October 26, 2021.
 - ii. An order of prohibition do issue to prohibit the respondent from taking any such steps against the applicant pursuant to the letter Ref: ML&SP/TU/171/2/172 dated October 26, 2021.
 - iii. An order of mandamus do issue to direct the respondent to execute their statutory obligations to perform its regulatory role in line with the Constitution of Kenya, Labour Relations Act and to register the changes to the applicant's registered Constitution.
10. The motion is based on the grounds contained in the statutory statement dated February 10, 2022 and the verifying affidavit sworn on even date by Dishon M Angoya, both of which were filed together with the application for leave to initiate these proceedings.

Applicant's Case

11. The applicant's case is that: -
 - i. Vide a letter dated October 26, 2021, the respondent refused to register the changes as amended under rule 3.5 of its constitution already served upon it on May 28, 2021.
 - ii. Rule 3.5, of its constitution on membership, establishes interior design to encompass curios, decorations, walling, ceiling, glass and aluminum fittings, painting, upholstery, garment making, cushioning and other textile works, import and export, carpeting, joinery, property agents and caretakers which provision is already amended.
 - iii. It applied for registration of the amendment in its registered constitution and rules to the respondent on May 28, 2021 to read as: Interior Design -curios, decorations, walling, glass and aluminum fittings, painting, upholstery, cushioning and other textile works, import and export of materials used in the industry e.g carpets, granites, curtains, wooden flooring, ceilings, sofa set materials and many others.
 - iv. The respondent forwarded to the Government Printer the Notice of Gazettement of the amendment of its constitution as required under section 27(4) of the Labour Relations Act.
 - v. The said Gazette Notice was then published in the Kenya Gazette Notice No 8184 dated July 14, 2021.
 - vi. The respondent refused to register the changes as amended under rule 3.5 of its constitution.
 - vii. The said refusal is gross violation of articles 2(6), 41(4) of the Constitution of Kenya, ILO Convention No 98 and section 27 of the Labour Relations Act.
 - viii. By way of voluntary association, it has in its membership a total of 1,000 employees working within the textile sector.



- ix. The Tailors and Textile Workers Union is currently representing some textile workers but argues that representation cannot be described as sufficient within the understanding of the law.
- x. The objections by the COTU(K) (Central Organisation of Trade Unions) and Tailors and Textile Workers Union was misplaced; the applicant has a definite and clearly demarcated area of representation and is entitled to such constitutional amendments under the [Labour Relations Act](#).
- xi. The decision of the respondent is extremely prejudicial to the applicant, her members and the administrative operations as it will incapacitate the applicant to protect its members from the respondent's unfair labour practices.

The Respondent's Case

12. Upon service of the motion application on the respondent, it filed a replying affidavit sworn on the March 9, 2022, by Elizabeth Gicheha, who describes herself as the Registrar of Trade Unions, Ministry of Labour and Social Protection. Briefly, Ms Gicheha avers that: -
 - i. Under section 31(1) of the [Labour Institutions Act](#), it is the mandate of the respondent under the law to register and regulate all trade unions, employer's organizations and federations in the Republic of Kenya.
 - ii. The applicant on June 9, 2021, submitted an application to the office of the respondent with proposed changes wanting to amend its Constitution which application underwent all the necessary required legal processes as provided by the law.
 - iii. The respondent notified the public of the said proposed amendments /changes in the newspaper dated August 13, 2021 and *vide* Gazette Notice Number 8184.
 - iv. Under the law, the gazette notice notifies all person and other stakeholders of the intended trade union constitutional amendments and/or changes with a legal requirement that any person not satisfied with the amendments can raise objections if any to such proposed amendments.
 - v. The respondent received complaints and objections from Tailors and Textiles Workers Union dated 3rd August (sic), 2021, objecting to the registration of the said amendments/changes. The objection was that the inclusion of the membership clause which was to include employees engaged in garment making, cushioning and other textile workers and their imports and exports would be an attempt to encroach on their scope of representation.
 - vi. COTU(K) further acting on the gazette notice, raised an objection through their letter dated September 6, 2022 (sic) stating that the main agenda of the applicant was expansionism by infiltration as opposed to representation which is the main reason why trade unions are formed.
 - vii. The proposed amendments by the applicant has caused a lot of confusion which prompted United Aryan EPZ Limited to instruct its lawyer who wrote to the respondent seeking clarification and guidance on the proposed amendments.
 - viii. The respondent through its letter dated October 26, 2021, wrote and advised the applicant that the proposed amendments would cause duplication and/or encroach to the scope of Tailors and Workers Union and should expunge garments making workers and other textile workers for it to qualify for registration.



- ix. The orders the applicant is seeking have no legal backing in law and if granted, would cause great harm within the trade unions in Kenya as the said amendments were not clear, precise and definite.
- x. The instant application is a desperate attempt by the applicant to use the court process to obtain the interim orders that would be in his favour in total disregard of the other trade unions who have raised objections to the proposed amendments.

Submissions

13. The application was canvassed by way of written submissions. The applicant reiterated the grounds contained in its statutory statement and its verifying affidavit which were filed together with the chamber summons application seeking leave. It was the applicant's submissions that the respondent is misrepresenting the mandatory provisions of section 27 of the *Labour Relations Act*. That further, the respondent has no right whatsoever to challenge the manner in which the applicant conducts its affairs with regard to its registered constitution. To buttress its arguments, the applicant placed reliance on the case of *Kenya National Union of Nurses vs Registrar of Trade Unions & 8 others* (2016) eKLR.
14. On its part, the respondent submitted that the application was filed prematurely. That any amendments and/or changes to the registered trade union constitution must comply with the provisions of the law. It further urged that the said changes should be clear, precise and not infringe on other registered unions constitutional mandate. That any ambiguity to the proposed amendments if objected, by other trade unions should be addressed before effecting registration.
15. It was the respondent's further submissions that under the law, it is its responsibility to communicate and advise the applicant on the proposed constitutional amendments whenever objections are raised. That it is totally wrong for the applicant to term the objections raised by other registered trade unions as of no consequence and baseless under the law. In support of its position, the respondent cited the case of *Joel Mbutia & 2 others vs Registrar of Trade Unions and another* (2018) eKLR.
16. It was further submitted by the respondent that the applicant had failed to demonstrate with precision how and to what extent its actions has fundamentally violated its constitutional rights as alleged. The cases of *Felix Musyoka Sammy & others vs Registrar of trade unions & others* [2016] eKLR, *Charles Osicho & another vs Registrar of Trade Unions & another* [2017] eKLR and *Frank Esvwe & 6 Others vs Registrar of Trade Unions* (2018) eKLR were cited in further support of the respondent's submissions.

Analysis and determination

17. I have considered the motion application herein, the verifying affidavit, the grounds raised in the statutory statement, the response to the application and the opposing submissions. Drawing from the context of the dispute and the material before court, the broad issue for determination is whether the applicant has established a case for the grant of the judicial review orders sought herein.
18. It is common ground that the applicant submitted amendments to its constitution to the respondent *vide* its notice of amendment dated May 28, 2021. The said amendments primarily focused on its membership. It is evident that the contentious amendment is in respect to membership drawn from interior design and which is proposed to include curios, decorations, walling, glass and aluminum fittings, painting, upholstery, cushioning and other textile works, import and export of materials used in the industry e.g carpets, granites, curtains, wooden flooring, ceilings, sofa set materials and many others.



19. It is also common ground that the respondent *vide* a Gazette Notice dated August 13, 2021, notified the members of the applicant and other members of the public of the proposed amendments to the applicant's constitution and subsequently, invited objections thereto, in writing within 21 days. Seemingly, the said notice caught the attention of the Tailors and Textile Workers Union who lodged an objection *vide* its letter dated September 4, 2021. The said union cited encroachment by the applicant into other unions' sectors. The said union specifically took issue with the applicant's use of the words "garment, textile, imports and exports" in the proposed amendments to the Constitution.
20. Further, COTU(K) raised an objection *vide* its letter dated September 6, 2021, in which it accused the applicant of expanding and infiltrating other areas and sectors already represented.
21. The respondent reverted to the applicant *vide* its letter dated October 26, 2021, noting that trade unions are sector based and the sector has to be relevant to the employees. In this regard, the respondent drew the applicant's attention to the words "other textile works" and "many others" and advised that the provision was omnibus and too general. The respondent thus advised the applicant to delete the said words or to be more specific. The respondent further advised the applicant to collect the draft constitution for necessary alterations and return the same for consideration and further action.
22. Therefore, it is evident that the crux of the dispute is the registration of the proposed amendments to the applicant's constitution.
23. Section 27(4) and (5) of the [Labour Relations Act](#), which is significant, provides as follows: -

“ [27(4)] Upon receipt of the notice of change of name or constitution, the Registrar shall give a notice of at least twenty-one days in the Gazette and in three daily newspapers of national circulation inviting any objections to the proposed change of name or constitution by members of the trade union and where any such objection is raised, the Registrar shall investigate the complaint and the grounds relied upon and may—

 - (a) refer the matter to the Industrial Court;
 - (b) refuse to accept the proposed amendments; or
 - (c) make any orders that he may deem fit in the circumstances.

(5) The Registrar may approve a change of name or to the constitution if the applicable requirements of registration of a trade union, employer's organisation or federation are met.”
24. Applying the foregoing provisions to the instant case, it would seem that the respondent complied with the requirements stipulated under section 27(4) of the [Labour Relations Act](#) and what is being now called into question is her exercise of discretion under section 27(5).
25. The main reason given by the respondent was that the proposed amendments should be categorical and not general to avoid confusion and encroachment. The applicant was thus advised to reconsider the use of the word "other textile works" and "many others".
26. Indeed, the applicant has conceded to the existence of the Tailors and Textile Workers Union currently representing some of the workers in the textile industry. Its contention in this regard is that the said representation is not sufficient. With due respect, this should not be the reason for going against the general rule of "demarcation" when it comes to trade union membership.



27. It also bears to note that the exercise of the discretion of the respondent under section 27(5) of the Labour Relations Act is largely drawn from the provisions of section 14(1) (d) which provides as follows: -

“ [14(1)] A trade union may apply for registration if—

.....

- (d) 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; or
 - ii. in the case of an association of trade unions, sufficiently representative of the whole or a substantial proportion of the trade unions eligible for membership thereof:
28. The import of the foregoing provision is that the Registrar of Trade Unions is precluded from registering a trade union when there is another trade union that is sufficiently representative of the whole or of a substantial proportion of the interests in respect of which the applicants seek registration. Ideally, this is the yardstick that is applicable when the Registrar of Trade Unions is determining whether to approve a change of name or to the constitution.
29. In the instant case, the respondent was of the view that the proposed amendments by the applicant would cause confusion and encroachment.
30. Having considered the proposed amendments vis a vis the relevant legal provisions, I am inclined to agree with the respondent that the use of the words “other textile works” and “many others” is too open ended and could potentially cause confusion and encroachment in regards to trade union membership. This is further coupled by the fact that there exists another union which is sufficiently able to represent members in the sector proposed to be covered.
31. In as much as the applicant has a right under Article 41 (4) (a) and (b) of the Constitution to determine its own administration, programmes and activities, and to organize, the same ought to be undertaken within the limits of the law and in this case, the Labour Relations Act. The said constitutional provision is therefore not a through pass to circumvent applicable provisions of the law. This includes making constitutional amendments that are legally compliant and not outside its scope of representation.
32. Against this background, I am of the firm view that the respondent properly exercised her discretion in refusing to register the proposed amendments to the applicant’s constitution. Thus, the respondent’s decision cannot be faulted.
33. In any event, I note that the respondent did not entirely throw out the applicant’s proposed amendments as she recommended that it effects alterations as proposed and resubmit the draft constitution for consideration and further action. This therefore means that the door is still open for the applicant to resubmit its constitutional amendments subject to the proposed alterations.

Order

34. The upshot of my findings is that the applicant’s motion application dated February 10, 2022 is not meritorious and is struck out with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF SEPTEMBER 2022.



.....
STELLA RUTTO

JUDGE

Appearance:

For the applicant Mr. Angoya

For the respondent Mr. Oure

Court assistant Abdimalik Hussein

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 March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

