



Oira & another v Kenya National Union of Nurses & 2 others (Appeal E015 of 2021) [2022] KEELRC 3913 (KLR) (16 September 2022) (Ruling)

Neutral citation: [2022] KEELRC 3913 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
APPEAL E015 OF 2021
DKN MARETE, J
SEPTEMBER 16, 2022**

BETWEEN

EPHONE NYANGENA OIRA 1ST APPELLANT

LUKAS KINUTHIA NYARARA 2ND APPELLANT

AND

REGISTRAR OF TRADE UNIONS 1ST RESPONDENT

KENYA NATIONAL UNION OF NURSES 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

RULING

1. This is an application by way of Notice of Motion dated January 20, 2022 and seeks the following orders of court;
 1. The applicant/proposed 3rd respondent, Kenya National Union of Nurses (KNUN) a union directly affected by the appeal and whose involvement is necessary and warranted in order to enable the court to effectually and completely adjudicate upon and settle all questions involved in the appeal be granted leave to be enjoined in this appeal as the 3rd respondent.
 2. Consequent to enjoinder, the applicant/proposed 3rd respondent be allowed to file the necessary pleadings within 14 days or such other reasonable time as this honourable court may direct, upon being properly served with the pleadings already filed by the other parties in this appeal.
 3. Costs of this application be in the cause.



2. The application is grounded on the basis that the appeal touches on the registration of a trade union in the sector and bearing similarly and name of the proposed 3rd respondent and therefore the necessity of involving her in this appeal.
3. The 1st respondent in a replying affidavit sworn on February 3, 2022 comes out to explain her role as registrar of trade union as follows;
 3. That on October 7, 2021 the appellants applied for a certificate under section 12 of the [Labor Relations Act](#) to enable them establish a trade union in the name of nurses and midwives union of Kenya (Annexed and marked 'ENG 1' is a copy of the application letter)
 4. That on October 26, 2021 the 1st respondent declined to issue the certificate on the ground that the name of the proposed trade union was sufficiently similar to an existing registered union, the Kenya National union of nurses which represents the same workers the proposed union intends to represent.(Annexed and marked 'ENG 2' is a copy of the letter from the 1st respondent declining to issue the certificate)
 6. That section 12 (3) of the Labor Relations Act 2007, gives the 1st respondent a time frame of thirty (30) days within which to issue a certificate to promoters of the proposed trade union but which conditions that the name of the proposed trade union is not the same as that of an existing trade union, or similar so as to mislead or cause confusion.
 10. That there were no objections from any other trade union because the application by the appellants was for a certificate to enable the promoters to undertake activities geared towards establishing a trade union and not an application for registration requiring gazettment in the Kenya Gazette and advertisement in the dailies and therefore the appellant's application had not reached the gazettment stage which follows the formal application under section 14 of the [Labor Relations Act](#) allowing any registered trade union to object.
4. The respondents further and in their Grounds of Opposition dated March 3, 2022 oppose the application for being fatally defective, bad in law and an abuse of the process of court. It is also their submission that the application is unmerited and a conglomeration of lies, half-truths and condiment of true facts. They put it thus;
 3. That the orders sought by the proposed 3rd respondent herein only aims at perpetuating an ancient and untenable injustice perpetrated by the applicant by resorting to seemingly endless streams of legal maneuvers.
 4. That the proposed 3rd respondent claiming to be enjoined in the proceedings must have an interest in the pending litigation and it must be legal identifiable and demonstrate a duty in which the applicant has failed to demonstrate.
 5. That the proposed 3rd respondent need to demonstrate that their interest in the matter goes beyond the stating that they are merely going to being affected by the judgment or order that will be made by court, but it must be shown that their presence is necessary so that the issues in the suit may be settled and that if the person is not fully enjoined, the court may not be fully equipped to settle the question in the suit or may be handicapped in many ways.
 6. That the 1st respondents does not indicate whatsoever if it had received any objection from any other registered trade union, Federation of Trade Unions' or any Employers Organization or Federation of Trade Unions or any Employer Organization or Federation of Trade Unions' or any Employer Organization or Federation including the proposed 3rd respondent to the issuance of certificate and registration of Nurses and Midwives Union of Kenya (NMU-K).



The applicant's aim is to deny the 1st and 2nd respondent their right as provided under section 4 of the [Labor Relations Act](#) and article 41(2) of the 2010 [constitution](#) of Kenya.

7. That there is no affidavit evidence or draft pleading to assist this court to discern that the proposed 3rd respondent has identifiable stake or legal interest herein of what prejudice the proposed 3rd respondent will suffer if not enjoined in the proceeding. It is crystal clear that the 3rd respondent has a bad motive to be enjoined in the suit to deny justice to the appellants.
 9. That the proposed 3rd respondent did not have any basis to conclude that the interests of NMU-K members were adequately covered and taken care of by other trade unions more so in the absence of objections from any trade union, federation or employers' organization the proposed 3rd respondent included.
 10. That the refusal by the 1st respondent to register the NMU-K upon satisfying the requirements of section 12 and 18 of the [Labour Relations Act](#) no 14 of 2007 is contrary to article 41(2) of the bill of rights as contained in the [constitution](#) of Kenya 2010 and the same is null and void *ab initio*.
5. The proposed 3rd respondent in her written submissions dated March 23, 2022 comes out thus;
6. In the case of [Kenya Tertiary & School Workers Union \(KETASWU\) vs Karatina University; Kenya Union of Domestic Workers, Educational Institutions and Allied Workers \(KUDHEIHA\) \(Proposed 2nd Respondent\)](#) (2021) eKLR, the court held as follows;

“This matter tilts in favour of the proposed 2nd respondent. She has demonstrated a hefty case in favour of being awarded an opportunity to be enjoined and heard in the matter. This is because the right to be heard is basic and enlisted as a fundamental right and freedom in our constitution. It is undeniable.

The proposed 2nd respondent's stake in this action as brought out is eye catching. It cannot be diminished or extinguished. It is as clear as day light. It is indomitable. They would have to be involved in this suit with a view to establishing a lasting solution to the issues raised. This is essence of joinder of parties. Matters must be resolved and thrashed to portion, in the presence of all stakeholders, as applicable.

Having established a case of joinder, I award the same to the proposed 2nd Respondent, albeit in a varied form. I allow it to come in as an Interested Party to the suit.”

Further,

7. In the case of [Attorney General v Kenya Bureau of Standards & Another](#) (2018) eKLR, the court observed thus;

“Having thus set out the law applicable to the circumstances of this case, we stress that power of the court to add a party to proceedings can be exercised at any stage of the proceedings including at the appellate stage.

Indeed, a party can be joined even without applying. We also bear in mind the principle that no suit shall be defeated by reason only of the misjoinder or non-joinder of a party; and that the court may proceed to determine the matter in controversy so far as the rights and interests of the parties actually before it are concerned.

In our view, the circumstances must justify the joinder, in that the claim and defense before the court must raise a doubt as to which of the parties is liable in the final outcome of



the dispute. In this regard, it is clear that KEBS knowingly and intentionally left out the applicant from the arbitral and High Court proceedings. Again, it must be demonstrated that it would be desirable to add the applicant as a new party and that his presence would enable court to resolve all the matters in the dispute.”

8. We further seek to rely on the authority of rule 10(2) of order 1 of the *Civil Procedure Rules* (CPR) provides thus;

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

9. Again, she seeks to rely on the authority of *Central Kenya Ltd v Trust Bank Ltd & 5 Others* (2000) eKLR, the court held thus;

“All amendments and joinder should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs.”

9. She further seeks to rely on the authority of the case of *Sammy Kanyi Kareithi v Barclays Bank of Kenya & 2 others; Ross Xavier Whitbey (applicant)* (2021) eKLR, the court held as follows;

“The plaintiff’s advocates also raised an interesting objection to the application for joinder. It was submitted that the application was incurably bad in law because the Applicant had not annexed a draft statement of defence to the application for joinder. The plaintiff relied upon the case of *Thomas Odhiambo Okello v Peter Wanyama* (2019) eKLR and that of *Ecobank Kenya Ltd v Minolta Limited and 2 Others* (2018) eKLR in support of that submission.

The court is of the opinion that the plaintiff’s submission in that regard is totally misconceived. The cited authorities simply relate to applications to set aside default judgments. One of the requirements to be demonstrated by the defendant in such circumstances in order to justify a setting aside is that he has a defence on the merits. The said authorities are totally irrelevant to the instant application for joinder of the applicant as a defendant.”

10. Overall the court stated that;

“in determining whether the applicant should be admitted into these proceedings as an interested party we are guided by this court’s decision in *Mumo Matemo* case where the court (at paragraph 14 and 18) held;

“An interested party is the one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause. Similarly in the case of *Meme vs Republic* (2004) EA the High Court observed that a party could be enjoined in a matter for the reasons that;

- a. Joinder to provide protection for the rights of a person



- b. Joinder of persons because his presence will result in complete settlement of all the question involved in the proceedings.
- c. Joinder to prevent a likely course of profoliated litigation.

We ask ourselves the following questions

- I. What is the intended party? State the relevance in the proceedings and
- II. Will the intended interested party suffer any prejudice if denied joinder?

11. Again, in the case of Communication Commission of Kenya and 4 others vs Royal Media Services Limited (2014) (*supra*)

The court declined an application for joinder of an interested party, it held;

“The applicant now seeks to be enjoined in this matter, even though it was neither a party at the High Court nor at the Court of Appeal. The applicant has not demonstrated how the end of justice would better serve by enjoining it in the appeal.....

It went ahead to state that “We cannot exercise our discretion to enjoin a party that disguises itself as an interested party, while in actual fact merely seeking to institute fresh cause.”

This application tilts in favour of the Applicant/Proposed 3rd Respondent. This is because she has demonstrated adequate and legitimate interest in the issues on trial. The registration of a trade union that touches on her sectorial realm is out rightly an area of their concern and interest. The issues under litigation touch on their mainstay.

I am therefore inclined to allow the application with orders that each party bears their costs of the same.

DATED AND DELIVERED AT NYERI THIS 16TH DAY OF SEPTEMBER 2022.

D K NJAGI MARETE

JUDGE

Appearances

Mr Busiega instructed by Mayende & Busiega Advocates for the Proposed 3rd respondent/applicant.

Mr Kirwa instructed by Mwakio Kirwa & Company Advocates for the appellants.

No appearance for the 1st and 2nd respondent.

