



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

APPEAL NO. 5 OF 2020

(Appeal under section 30 of the Labour Relations Act, 2007)

IN THE MATTER OF APPEAL OF

HESBON LUMUMBA M'MBOLO.....1st APPELLANT

JANET MUSIMBI OLWANGU.....2nd APPELLANT

CAROLYNE MUKHWANA.....3rd APPELLANT

JAIRUS KATERE SHAMALA.....4th APPELLANT

DEBORAH KERUBO OGAKE.....5th APPELLANT

ONGERA SAMSON OMECHI..... 6th APPELLANT

WILFRED DIZUZA BOGONKO (suing on behalf of the proposed

Kenya Union of Special & Professional Guards)

REGISTRAR OF TRADE UNIONS.....RESPONDENT

KENYA NATIONAL PRIVATE SECURITY

WORKERS UNION.....1st INTERESTED PARTY

CENTRAL ORGANISATION OF TRADE UNIONS....2nd INTERESTED PARTY

(Being an Appeal against the Respondent's decision in the Notification of Refusal to register, Form D dated 18 February 2020, conveying her refusal to register the Appellants proposed Kenya Union of Special & Professional Guards as was applied vide the Appellants application in Form A dated 9 October 2019)

RULING

1. This Court was expected to deliver a judgment today, but it has decided to deliver a Ruling for reasons that will emerge shortly.
2. On or around 7 May 2017, the Appellants herein applied to the Registrar of Trade Unions (the Registrar) for a *certificate of recruitment* in respect of the Kenya Union of Special & Professional Guards (the proposed Union).
3. In a response dated 24 May 2018, the Registrar informed the Appellants that security guards were already represented by the Kenya National Private Workers Union (the 1st Interested Party herein). Therefore, the application had failed.
4. Dissatisfied, the Appellants appealed through Nairobi Appeal No. 9 of 2018, *Hesbon Lumumba M'mbolo & Ors v Registrar of Trade Unions*. The Registrar filed a replying affidavit in opposition to the Appeal.
5. The 1st Interested Party herein applied to be joined those proceedings as an Interested Party. It and other parties were joined as Interested Parties.

6. The Court (differently constituted) heard the Appeal, and a Judgment was rendered on 22 March 2019.
7. The Court found in favour of the Appellants, and the following orders were issued
 - (a) THAT the declaration that the Respondent (Registrar of Trade Unions) failed in her statutory duty when she communicated her decision vide letter dated 24 May 2018 declining to issue the Appellants with the recruitment certificate in terms of section 12 of the Labour Relations Act, 2007 the action is bad in law and the letter dated 24 May 2018 is invalid, null and void ab initio.
 - (b) THAT the declaration that the fundamental rights and freedom of association of the Appellants were substantively breached by the Respondent (Registrar of Trade Unions) refusal to issue the certificate of recruitment sought in a letter dated 7 May 2018.
 - (c) THAT the order of injunction compelling the Respondent (Registrar of Trade Unions) to issue Appellants or promoters with the certificate of the proposed Kenya Union of Special and Professional Guards (KUSPROG) as applied in the letter dated 7 May 2018 and not later than 30 days from the date of this judgment.
 - (d) THAT the Respondent to pay the Appellants costs of the Appeal and other parties to bear own costs of the proceedings.
8. Consequently, the Registrar issued a *certificate of recruitment* on 18 April 2019 and the Appellants formally applied for registration through a letter dated 11 October 2019.
9. However, the 1st Interested Party was aggrieved with the judgment, and it appealed to the Court of Appeal, Nairobi Civil Appeal No. 154 of 2019, *Kenya National Private Security Workers Union v Hesbon Lumumba & Ors.*
10. The Registrar, acting upon the judgment gazetted the application by the proposed Union on 15 November 2019.
11. Upon the gazette, the 1st Interested Party and the Central Organisation of Trade Unions (COTU) raised objections to the registration of the proposed Union.
12. The Registrar and the Appellants entered into an exchange of communication culminating in the Registrar writing to the Appellants on 20 February 2020 that she had refused to register the proposed Union.
13. The refusal prompted the Appellants to institute the instant Appeal on 25 March 2020 contending that
 - (i) The Respondent's (Registrar of Trade Unions) erred in law and fact when she refused to register the proposed Kenya Union of Special & Professional Guards (KUSPROG) vide her communication notification of refusal in Form D dated 18 February 2020 purportedly issued pursuant to section 20 of the Labour Relations Act, 2007.
 - (ii) The Respondent's notification of refusal in Form D dated 18 February 2020 made serious errors in law and in fact by declining the Appellants application for registration of the proposed KUSPROG on the grounds that the security guards are already represented by the existing Union.
14. Filed together with the Appeal was a Motion under a certificate of urgency seeking orders staying the decision of the Registrar refusing to register the proposed Union, amongst other orders.
15. On 8 April 2020, the Court directed that the Appeal be heard on a priority basis upon resumption of normal court sittings. But on 23 June 2020, the Appellants filed another Motion seeking an order vacating the direction that the Appeal be heard upon resumption of normal court proceedings.
16. The Court directed that Motion be canvassed through submissions before the scheduling of a judgment date.
17. On 14 July 2020, the firm of Chwero & Co. Advocates filed a Notice of Appointment to act for the Appellants (the Appellants filed a Notice to act in Person on 11 August 2020).
18. On 18 August 2020 and 31 August 2020, the 1st Interested Party and COTU filed applications to be joined to this Appeal, and the Court allowed the applications on 5 October 2020.
19. When the parties appeared before this Court on 12 November 2020, the Court was informed that all the parties had filed and exchanged submissions and were awaiting judgment.
20. Since the Registrar's and Interested Parties' submissions were not on file, the Court directed that the same be placed on the file ahead of judgment today.
21. The following are on record
 - (a) Memorandum and Record of Appeal.

- (b) Appellants submissions on 20 July 2020.
- (c) Appellants' supplementary affidavit filed on 30 September 2020.
- (d) Appellants' supplementary submissions filed on 11 November 2020.
- (e) COTU'S submissions filed on 12 November 2020.
- (f) The 1st Interested Party's submissions filed on 14 November 2020.
- (g) Registrar's submissions filed on 16 November 2020.

22. In their submissions, the Appellants raised 8 Issues, to wit:

- (a) Did the Appellants application for registration of the proposed Union (KUSPROG) in Form A dated 9 October 2019 meet all the legal parameters set out by the Act, for purposes of registration of KUSPROG?
- (b) Did the Respondent exercise her statutory mandate lawfully while considering the Appellant's application, Form A, dated 9 October 2019?
- (c) Is the sector under review (private security industries) sufficiently representative of its union representational interests?
- (d) Did the Respondent in declining registration of the Appellants proposed Union (KUSPROG) vide her notification of refusal to register, Form D dated 18 February 2020, acted lawfully, reasonably, justifiably, fairly and judiciously in an open and democratic society?
- (e) Did the Respondent's action, notification of refusal to register, Form D, dated 18 February 2020, informed by factual evidence/empirical figures?
- (f) Can the Respondent's decision, notification of refusal to register, Form D dated 18 February 2020 stand the test of law?
- (g) Can this Court disturb the Respondent's decision, notification of refusal to register, Form D dated 18 February 2020, issued pursuant to section 20 of the LRA, 2007?
- (h) Are the Appellants eligible for remedies and reliefs sought.

23. The Registrar on her part identified 2 Issues

- (a) Whether the refusal to register the proposed Union amounts to an infringement of the Appellants' constitutional rights.
- (b) Whether the interest intended to be covered by the proposed Union are adequately covered by other registered trade unions.

24. The 1st Interested Party identified the Issues as

- (a) Whether the Issues raised in this Appeal are *res judicata* and the suit offends the provisions of section 6 of the Civil Procedure Act.
- (b) Whether the interest intended to be covered by the proposed Union are adequately covered by the Kenya National Private Security Workers Union, the 1st Interested Party.
- (c) Whether the integrity issues facing the Appellants is allowed in law in terms of purported officials.
- (d) Whether or not the 1st Respondent exercised her mandate properly in accordance with the law in refusing to register the proposed Union.
- (e) Whether the suit should be struck out.
- (f) Who is to bear the cost of this Appeal?

25. COTU saw the Issues in near similar lenses with the 1st Interested Party, and it asked the Court to examine the questions

- (a) The Court needs to first certify if the appeal holds any water given that there is a matter Civil Appeal No. 154 of 2019 that deals with the same issue before this Court where a final ruling is yet to be delivered.

- (b) Whether the members to be covered by the proposed Union are adequately covered by the 1st Interested Party's Union.
- (c) Whether the integrity issues facing the Appellants' is allowed in law in terms of purposed officials.
- (d) Whether or not the Respondent acted in accordance with the law in refusing to register the proposed Union.
- (e) Whether the suit should be struck out.
- (f) Who is to bear the cost of this appeal?

26. The Court has considered all the material placed before it.

Res judicata

27. The 1st Interested Party and COTU objected to the competence of the Appeal on the ground that there were pending proceedings Civil Appeal No. 154 of 2019, *Kenya National Private Security Workers Union v Hesbon Lumumba & Ors* where the subject of the dispute was the same as herein.

28. The Appeal emanated from a judgment of this Court (differently constituted) in Appeal No. 9 of 2018, *Hesbon Lumumba M'mbolo & Ors v Registrar of Trade Unions*.

29. The judgment addressed the question of the Registrar's refusal to issue the Appellants with an interim *certificate of recruitment* under section 12 of the Labour Relations Act.

30. The instant proceedings however challenge the refusal of the Registrar to register the proposed Union in terms of section 20 of the Labour Relations Act.

31. The Issues are therefore distinct though closely interwoven. In the circumstances, the Court finds that *res judicata* does not apply.

Sub judice

32. On the twin question of *sub judice*, it is not in dispute that a *certificate of recruitment* issued pursuant to section 12 of the Labour Relations Act is a statutory *sine qua non* for the registration of a trade union.

33. The Court (differently constituted) found the refusal by the Registrar to issue the *certificate of recruitment* unlawful and ordered her to issue one to the proposed Union.

34. The decision of the Court is under challenge before the Court of Appeal in Civil Appeal No. 154 of 2019, *Kenya National Private Security Workers Union v Hesborn Lumumba & Ors*. The Court of Appeal is yet to determine the Appeal.

35. Without second-guessing the Court of Appeal, were the Court of Appeal to uphold the Appeal by the 1st Interested Party, the legal impact would be that the statutory *sine qua non* upon which the proposed Union anchored its application for registration would have dissipated.

36. The legal significance of such an outcome from the Court of Appeal would render any judgment by this Court an academic exercise. For it would be an embarrassment for this Court to find the decision of the Registrar declining to register the proposed Union unlawful whilst the Court of Appeal reaches the conclusion that the denial of a *certificate of recruitment* was sound in law.

37. In other words, the outcome of Appeal No. 154 of 2019, Civil Appeal No. 154 of 2019, *Kenya National Private Security Workers Union v Hesbon Lumumba & Ors* is so legally interwoven with the instant Appeal that it would serve no purpose for this Court to determine the instant Appeal on the merits before the decision of the Court of Appeal.

38. In reaching its conclusion, the Court has been alive to the caution by the Supreme Court in *Law Society of Kenya v Attorney General & Ar* (2019) eKLR that a Court should take judicial notice of pending proceedings whose determination may bind it and/or affect a dispute before it (where there are related issues)

39. The upshot of the above is that this Appeal ought to be stayed pending the outcome of the pending the determination of Nairobi Civil Appeal No. 154 of 2019, *Kenya National Private Security Workers Union v Hesborn Lumumba & Ors* Appeal before the Court of Appeal.

Conclusion and Orders

40. From the foregoing, the Court orders

- (a) THAT this Appeal and the proceedings hitherto be stayed pending the outcome of Civil Appeal No. 154 of 2019, *Kenya National Private Security Workers v Hesbon Lumumba & Ors*.

41. Costs in the cause.

Delivered through Microsoft teams, dated and signed in Kisumu on this 10th day of February 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Appellants Mr. Shammala, Interim Secretary General, Kenya Union of Special & Professional Guards

For Respondent Ms. Essendi, Senior Litigation Counsel instructed by the Office of the Hon. Attorney General

For 1st Interested Party in person

For 2nd Interested Party Mr. Okello, Advocate, Central Organisation of Trade Unions

- Court Assistant Chrispo Aura