



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA
AT NAIROBI
APPEAL NO. 26 OF 2020

- 1. PETER KAREGUA MWANGI**
- 2. GLADWEL WANJIKU MUTHIKE**
- 3. DOROTHY KARITHI JUSTUS**
- 4. HARUN KARAU MURAGE**
- 5. ELIAS MUTUMA IRURA**
- 6. CHADO BAKLEY MOSES**
- 7. DAVID MUCHIRI THUO**

(Suing on behalf of themselves and for all other members of the Kenya National Union

*of Pharmaceutical Technologists).....***APPELLANTS**

VERSUS

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

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

AND

KENYA UNION OF DOMESTIC HOTELS,

EDUCATIONAL INSTITUTIONS AND HOSPITAL

WORKERS (KUDHEIHA WORKERS).....1ST INTERESTED PARTY

UNION OF KENYA CIVIL SERVANTS (UKCS).....2ND INTERESTED PARTY

JUDGMENT

1. The appellants who are the promoters of the proposed Kenya National Union of Pharmaceutical Technologists, filed the Appeal on 14/4/2020 seeking an order in the following terms: -

- (i) **allow the appeal and order the Registration of the Kenya Union of Pharmaceutical Technologists;**

(ii) to issue an order of certiorari to bring to this Honourable Court the Respondent's form D dated 18th February, 2020 declining registration of Kenya Union of Pharmaceutical Technologists for the purpose of quashing the same;

(iii) as an alternative to (i) above, this Honourable Court do issue a mandatory injunction requiring the first Respondent to register the Kenya Union of Pharmaceutical Technologists forthwith;

(iv) the 1st and 2nd Respondents do pay the Appellants' vindicatory damages for contravention of the Appellants' rights under Article 36 and 41 of the 2010 Constitution;

(v) Costs of this suit.

2. The appeal is premised on grounds set out in the body of the appeal at paragraph 7 (a) to (K) which grounds may be summarized as follows: -

(a) the 1st and 2nd respondents erred in holding that the appellant can be sufficiently represented by the 1st and 2nd Interested Parties; there is an error on the face of the notification of refusal or registration in that the same is based on Section 80 of the former Constitution and not Article 41 of the Constitution of Kenya, 2010; the Appellants state that none of the two unions: -

(i) adequately represents the interests of pharmaceutical officers; indeed, none of the Interested Parties represents the pharmaceutical officers;

(ii) the two interested parties are jacks of all trade unions with no time technical skills/knowledge of the specific needs of the approximately 408 pharmaceutical technologists. Indeed, none of pharmaceutical technologists is a member of the 1st and 2nd Interested Parties by application.

(b) it is untrue that granting the registration would dissect the medical sector and open a Pandora's box whereby every cadre of officers in the medical sector would agitate for their own union leading to proliferation of unions in the various hospitals. The truth of the matter is that the union wants to cover pharmaceutical technologists. Currently, there exist other unions for the clinical officers, nurses and medical doctors;

(c) the decision appealed against was under Section 14(d) (i) of the Labour Relations Act which is *ultra vires* Articles 36 and 41 of the 2010 Constitution and therefore, null and void;

(d) section 14 (1)(d) (i) of the Labour Relations Act, 2007 was based on Section 80(2) (d) of the former Constitution which was replaced by the 2010 Constitution;

(e) unlike the former Constitution the 2010 Constitution protects the rights of the individual by severely limiting the situation in which public good will trump freedom or right of the individual;

(f) the 1st respondent has discriminated against pharmaceutical technologists within the meaning of Article 27 of the constitution;

(g) the refusal of registration is a contravention of the applicant's right under Article 41 of the Constitution to fair labour practices and also, a contravention of a right to property;

(h) the pharmaceutical technologists like clinical officers, Doctors and Pharmacists whose professions have formed Trade Unions belong to a profession which is regulated by the law;

(i) the decision of the 1st respondent is against the weight of both law and evidence;

(j) the jurisdiction of the 1st respondent to register a trade union is a jurisdiction to enforce the rights to the freedom of association under Article 36 of the Constitution and the right to form, join or participate in the activities and programmes of trade union and the 1st Respondent grossly misapprehended the said jurisdiction;

(k) In Constitutional Law, the right to form a trade union is personal to the individual and other trade unions in existence cannot prevent one's enjoyment of the same under the 2010 Constitution.

3. The appeal is opposed by the 1st and 2nd respondents and two interested parties.

4. The respondents filed a replying Affidavit sworn to by E.N. Gicheha, the Registrar of Trade Unions who deposes *inter alia* that she has the Legal mandate to register and regulate Trade Unions under the Labour Relations Act, 2007 (LRA).

5. That the appellants applied for registration of Kenya National Union of Pharmaceutical Technologists (KNUPT) and that the application was presented following all the legal procedures provided for under the Labour Relations Act, 2007 (LRA) including placing the same before the National Labour Board for advice.

6. That the application was refused for reasons given in a notification for refusal (Form D) annexed to the replying Affidavit.

7. The annexed form 'D' provided the following grounds for refusal: -

- (i) That there are too many registered trade unions in the health sector.
- (ii) Registering unions based on professional and academic qualifications is not tenable as the employer will spend a lot of time negotiating and signing Collective Bargaining Agreements (CBAs) with each and every professional cadre.
- (iii) That the Industrial Relations Charter of 1980 provides for re-organization of trade unions along sector lines.
- (iv) That there are already existing unions which pharmaceutical technologists may join including the Union of Domestic, Hotels, Educational Institutions and Hospital Workers' (KUDHEIHA) which represents all persons employed as medical professionals (*except doctors*) in both public and private hospitals, chemists, pharmacists, medical institutions, referral centres and other related medical services.
- (v) Further that the Union of Civil Servants (UKCS) represents employees in the public service and the applicants in the public sectors may also be represented by the union.
- (vi) Furthermore under Section 14(1) (d) of the Labour Relations Act, is provided that a union may apply for registration if no other union already registered is 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 seeks registration.

8. The Registrar prays that the appeal be dismissed with costs.

9. The 1st interested party, **KUDHEIHA** filed a replying affidavit deposed to by Albert Njeru, the Secretary General of the union whose deposition may be summarized that the union has no objection to the appellants exercising their constitutional rights to form and join a trade union. However, the 1st Interested Party disputes the registration of the union since its registration would cause duplicity in that pharmaceutical technologists, are already, well represented by the 1st interested party in their respective jurisdiction of practice as they are well covered in **KUDHEIHA'S** Collective Bargaining Agreements. **KUDHEIHA** attached, a Memorandum of Agreement between Kenyatta National Hospital and **KUDHEIHA** (CBA) for the period 2011 o 2013, a CBA dated 5th December, 2018 between Aga khan University Hospital, Nairobi and **KUDHEIHA** and a Collective Bargaining Agreement between Moi Teaching and Referral Hospital and **KUDHEIHA** for the period July, 2017 to 30th June, 2021.

10. That the 1st interested party supports the decision by the respondents not to register the proposed union.

11 The 2nd interested party Civil Servants Union filed a replying affidavit sworn to by Jerry Ole Kina, 1st Deputy Secretary General who deposes *inter alia* that the union was registered in 2001 and its sole mandate is to represent civil servants in collective bargaining and labour relations across the board in the Republic of Kenya.

12. That the 2nd interested party is opposed to the application by the appellants to be registered to represent pharmaceutical technologists despite Article 36 and 41 of the Constitution which guarantees every person freedom of association and right to register and join union of choice respectively.

13. That Section 14(1) (d) of Labour Relations Act, permits non registration of a union in a sector where there is in existence another union properly representing the employees targeted to be represented by the intended union as in this case.

14. That the right under Article 36 and 41 have been properly limited by Section 14(1) (d) in terms of Article 24 of the Constitution, which allows a right to be limited by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors.

15. That the refusal to register the proposed union does not prejudice the rights of employees intended to be represented since they are already represented by the 2nd interested party. This is a legal threshold permitted under Section 24(1) (d) and (e) and the Registrar was within his mandate to refuse to register the proposed union. That the 2nd interested party has in the past concluded Collective Bargaining Agreements that cover pharmaceutical technologists within the civil service as shown in annexure '**JOK2**' a Collective Bargaining Agreement dated 18th October, 2012 and another Collective Bargaining Agreement between the Government and the 2nd interested party dated 27th June, 2017.

16. The 2nd interested party prays that the appeal be dismissed for want of merit.

Determination

17. The parties filed written submissions and the issues for determination are: -

- (i) Whether the grounds advanced by the Registrar of Trade Unions to refuse registration of the appellant are valid and reasonable.

(ii) What remedies, if at all are available to the appellant.

18. In answer to issue (i) above, the Court reverts to the four corners of Form D (S.20), the notification by the 1st respondent to the appellants of the refusal to register the proposed union to represent Pharmaceutical Technologists and the three reasons contained in the notification for the decision namely that: -

(a) There are too many unions in the health sector and registering unions based on professions and academic qualifications is not tenable since the employer will spend a lot of time negotiating with different cadre and signing different Collective Bargaining Agreements with each one of them.

(b) That the Industrial Relations Charter of 1980 which is appendix “B” to the Labour Relations Act provide for recognition of trade unions along sector lines and

(c) That the 1st and 2nd interested parties already represented the targeted employees (**Pharmaceutical Technologists**) in Collective Bargaining and already signed Collective Bargaining Agreements.

19. Bearing this in mind, the Court has considered the grounds of appeal set out in the Memorandum of appeal *vis a vis* the depositions in the replying affidavits of the 1st respondent, and the 1st and 2nd interested parties to determine if indeed there is sufficient evidence before Court to validate the reasons placed by the 1st respondent in the notification of refusal to register the interim union.

20. In this regard, the Court is of the considered view and finding that the Registrar of Trade Unions, the 1st respondent bears the onus of prove in terms of Section 107 and 108 of the Evidence Act, Cap. 80 Laws of Kenya, the validity of the reasons proffered for the refusal to register the interim union on a balance of probability.

21. On the other hand, the appellant bears the evidential burden of rebuttal to demonstrate that there is a vacuum in the representation of Pharmaceutical Technologists as contemplated under Section 14(1) (d) and (e) of the Labour Relations Act, to justify, the registration of the appellant union in terms of Section 12,13, and 14 of the Labour Relations Act and Articles 36 and 41 of the Constitution of Kenya, 2010.

20. The appeal is supported by an affidavit of Mr. Mutuma, sworn on 11/3/2020 in which is demonstrated that the interim union was established on 16th December, 2016. To the affidavit is appended a list of 408 Pharmaceutical Technologists who come from both the private and public sector and wish to be members of the interim union. The application was made on 19/2/2018 and refused on 20/2/2020.

21. The functions of the intended union as seen in the attached Constitution of the appellant include seeking and maintaining unified and better terms of service of all Pharmaceutical Technologists.

22. The appellants deny that the reasons advanced by the 1st respondent to refuse it registration are valid and cite the decision of this Court in **Seth Panyako and Others –vs- Attorney General [2013] eKLR**, in which the Court rejected the mundane reasons advanced by the Registrar of Trade unions to refuse to register the Kenya, National Union of Nurses, and went ahead to authorize its registration pursuant to an appeal filed in terms of Section 30 of Labour Relations Act which provides: -

“ 30 Any person aggrieved by a decision of the Registrar made under this Act may appeal to the Industrial Court against that decision within thirty days of the decision.”

23. This appeal was filed within the 30 days period.

24. In the case of Seth Panyako (*supra*), this Court cited Section 14(1) (d) of the Labour Relations Act, which reads: -

“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 portion of the interests in respect of which the applicant seek registration.”

25. The Court further cited Section 14(2) which reads: -

“Notwithstanding the provisions of subsection 1(d), the Registrar may register a trade union consisting of persons working in more than one sector if the Registrar is satisfied that the Constitution contains suitable provisions to protect and promote the respective sectoral interests of employees.” (emphasis mine)

26 It has been demonstrated by the appellant that its intended 408 members work in more than one sector. In fact, the Pharmaceutical Technologists work in the health sector across the Republic of Kenya, in private and public sector.

27. The term ‘‘Pharmaceutical Technologist’’ is defined by Wikipedia as follows: -

“Pharmaceutical Technician is a job title for a laboratory assistant or research assistant employed in the Pharmaceutical industry under the direct supervision of a physician, veterinarian or scientist involved in the research and development of new or existing medications.”

28. Wikipedia, goes ahead to define the role of a “pharmaceutical technologist” as follows: -

“A Pharmacy technician works closely with pharmacists in hospitals, drug and grocery stores, and other medical setting; to help prepare and distribute medicines to patients, use technology to help maintain accurate patient record, prepare and package medications and place orders...”

29. The Registrar did not demonstrate in the letter of refusal and before this court that **KUDHEIHA** and **Kenya Union of Civil Servants** who he cited as substantially representative of the interests of the intended members of the appellant that the two unions operated in the pharmaceutical industry in both human and veterinary services; in drug and grocery stores and other medical settings involved in preparation and distribution of medicine to patients and animal owners.

30. The 1st respondent and the 1st and 2nd interested parties also failed to demonstrate that any of the 408 intended members of the interim union were members of the 1st and 2nd interested parties or were catered for at all in the concluded CBAs between the 1st interested party and 2nd interested party with employers and or group of employers either in the public or private sector.

31. It is not lost to the Court that this Court has already authorized registration of various unions in the health sector on the basis of their respective areas of professional specialization and operations. Indeed, this has become the rule rather than the exception going by the authorities provided by the appellants in this matter.

32. In Seth Panyako (*supra*) the Court before authorizing registration of the Kenya National Union of Nurses (KNUN) at page 10 stated: -

“The membership of the proposed union consists of nurses drawn from private sectors and public sectors including Local Government. Therefore, in terms of Section 14(2) the Registrar in exercise of his discretion to register or not to register had to consider the Constitution of the union to determine if it contained suitable safeguards to protect and promote the “respective sectoral interest of the employees.”

33. This requirement is material in this case as was in Seth Panyako case. The Registrar ignored in the Court’s view and finding the sectoral interests of Pharmaceutical Technologists spread across industries where the 1st and 2nd interested parties do not operate.

34. *The Court stated further: -*

“These are weighty provisions that the Registrar of Trade Unions must put into consideration in exercise of his statutory duty to register or not to register a trade union.

In particular, the interpretation of Section 14(1) (d) (i) and 14(2) must be read in context of Section 4(1) (a) (b) and (c) of the Labour Relations Act and more so in the context of Article 41(2) (c) of the Constitution of Kenya, 2010.”

35. The Court has also considered the reliance by the Registrar of Trade Unions on the Industrial Relations Charter of 1980 appended to the Labour Relations Act as Appendix ‘B’ which provides for the reorganization of trade unions along sector lines. It is the Court’s considered view and finding that this remains a useful policy document for consideration on a case by case basis taking into account the reality brought about by the provisions of Section 36 and 41 of the Constitution of Kenya, 2010 and the jurisprudence developed by the Employment and Labour Relations Court pursuant to those provisions.

36. The Registrar did not consider at all the primacy of freedom of association mandated under Article 36 of the Constitution and the right to register a union and participate in its activities free from any inhibition not justified under Article 24 of the Constitution. This new constitutional paradigm supersedes hitherto valid reasons to refuse to register a union before 2010. To this extend the refusal to refuse registration of the appellant was unreasonable and not justifiable in an open and democratic society based on human dignity, equality and freedom.

37. In Appeal No. 7 of 2011, **David Benedict Omulama & 8 Others –vs- Registrar of Trade Unions and Another [2014] eKLR**, Mbaru J. whilst rejecting the reasons given by the Registrar in refusing to register Kenya Export Floriculture, Horticulture and Allied Workers Union (**KEFHAU**) which was opposed by Kenya Plantation and Agricultural Workers Union stated: -

“ Many employees in the emerging sectors are not represented so as to enrich the new emerging sectors to enable them have bargaining units and viable organizational structures that go to the employee at the shop floor. This Court finds that the refusal by the respondent to register the appellant is not justified or reasonable in the circumstances of this case as the interest to be addressed by the proposed Kenya Export Floriculture, Horticulture and Allied Workers’ Union is clearly defined.”

38. In the present case, the Court finds that the interest and sphere of operation to be represented by Kenya National Union of Pharmaceutical Technologists is clearly defined and is distinct from that represented by the 1st and 2nd interested parties. Therefore, the refusal by the 1st respondent to register the interim union is not justified or reasonable in the circumstances of this case.

39. In considering the claim for damages by the appellants, the court finds that the Registrar of Trade Unions acted on the advice of the National Labour Board and did not exercise its statutory mandate maliciously or capriciously. The court finds further that the appellants have not proved that they suffered loss and damage as a result of the 1st Respondent's decision not to register the interim union. The prayer for the court to award damages to the appellants is dismissed for want of proof.

40. I therefore enter judgment in favour of the appellants in the following terms: -

(a) An order of Certiorari to bring to this honourable Court the 1st Respondent's Form D dated 18th February, 2020 declining registration of Kenya National Union of Pharmaceutical Technologists is issued quashing the said decision.

(b) The Court issues a mandatory injunction requiring the 1st Respondent to register the Kenya National Union of Pharmaceutical Technologists forthwith.

(c) The respondents to bear the costs of the suit.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF JUNE, 2021.

MATHEWS N. NDUMA

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this judgment has been delivered to the parties online with their consent. 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 has 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 18 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.

MATHEWS N. NDUMA

JUDGE

Appearances

Mr. Ndung'u holding Brief for Mr. Kuria for Appellants

Mr. Gitonga for the 1st interested party

M/s Lingunya for 2nd interested party

M/s Oyugi for Respondent

Ekale – Court Assistant