



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

APPEAL 17 OF 2019

GABRIEL MWANGI (SUING ON BEHALF OF THE COUNTY ADMINISTRATORS OFFICERS)APPELLANT

VERSUS

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

KENYA COUNTY GOVERNMENT WORKERS UNION.....INTERESTED PARTY

JUDGMENT

1. This appeal was brought on 12.6.2019 to challenge the 1st respondents' refusal to register Kenya County Administrators Union (KCAU) as a trade union. The refusal was communicated vide the Notification (Form D) dated 20.5.2019, issued pursuant to section 14 (1) of the Labour Relations Act. The appellant seeks the following orders-

- a. The appeal be allowed.
- b. That the decision of the Registrar of Trade Unions made on 20th May 2019 refusing to register the appellant as a trade union be declared null and void and set aside.
- c. That the registrar of trade unions be ordered to register the Kenya County Administrators Union (KCAU) and issue a certificate of registration forthwith.
- d. The cost of the appeal be borne by the Respondent.

2. The appeal is premised on the following as the grounds: -

- a. The Respondent erred in law and fact by failing to find that the constitution and the law entitled individuals to freedom of association which includes the right to form and participate in trade unions of one's choice.
- b. The Respondent erred in law and fact by failing to appreciate that the interested party comprises only junior staff of the defunct local Authorities while the proposed union is specifically meant for the administrators who are senior employees employed under the county Governments.
- c. The Respondent erred in law and fact by failing to appreciate that the proposed union seeks to protect a specific cadre of employees who are senior in rank than those in the Interested party hence facing different challenges that warrant having a sector trade union.
- d. That in refusing registration of the proposed union the respondent failed to take into account relevant factors/considerations and proceeded on the basis of irrelevant/extraneous matters.
- e. The Respondent erred in law and fact in finding that the interested party has made provision for the protection and promotion of the interest of the appellant.
- f. The Respondent erred in law and fact by failing to consider that no objection to the proposed unions was raised.

g. That the decision to deny registration flies in the face of the appellant's legitimate expectation to fair, reasonable and lawful administrative action as well over 2000 administrators who remain unrepresented.

h. The Respondent erred in law and fact in failing to give the appellant an opportunity to be heard contrary to Article 47 of the Constitution read together with section 4(3)(b) of the Fair Administrative Actions Act on whether the Interested Party sufficiently represented the interests of the County administrators.

i. The Respondent erred in law and fact in failing to uphold Article 41 of the Constitution which guarantees every Kenyan fair labour practices.

j. That the decision not to register the proposed union was unjustified.

k. That the refusal to register the proposed union has affected over 470 county Administrators who cannot exercise their freedom of association.

l. That the impugned decision was not based on any evidence.

3. The appeal is supported by the appellant's affidavits sworn on 11.6.2019 and 1.10.2019 but it is opposed by the Respondent and the Interested Party vide the Affidavit sworn on 5.9.2019 and 11.10.2019 respectively.

The Appellant's Case

4. In brief, the Appellant's case is that there is no existing trade union that sufficiently represents the whole or a substantial proportion of the cadre of workers that the proposed trade union seeks to represent; that the proposed union has so far recruited 470 members who had legitimate expectation of belonging to a trade union; that no objection was raised by any union including the interested party who was specifically cited; that the refusal to register the proposed union was not based on any evidence and the reason given that the interested party sufficiently represented all county government workers was not valid; that the respondent did not accord him any hearing despite demand letter dated 17.6.2019; that the interested party covers junior staff in job group L and below while the proposed union will cover senior employees in job group N and P; that since the new constitution was passed in 2010, the respondent has registered different unions to cover specific sectors within the same industry; that no prejudice will be suffered if the appeal is allowed since it is in interest of justice that the same is allowed; finally, none of the county government administrators is a member of the interested Party.

Respondent's Case

5. The respondent averred that her mandate is registration and regulation of trade unions, employers' organizations and federations. She confirmed that the appellant applied for registration of Kenya County Administrators Union as a trade union, and she properly processed and submitted the appellant's application to the National Labour Board for advice during its meeting held on 10th-11th May 2019 in accordance with section 31(3) of the Labour Relations Act. However the Board's advice was against registration of the proposed union and on 17.6.2019, she conveyed the decision to the appellant and the grounds for the refusal vide the Form D dated 20.5.2019.

6. She contended that under section 14(1)(d) of the Act, a trade union can only apply for registration if no other union already registered is sufficiently representative of the whole or substantial proportion of the interests in respect of which the proposed union seeks representation. She further contended that although the constitution of the proposed union, sought representation for every administrator employed by a County Government, the interested Party was already registered to represent all officers employed by the County Governments in any capacity or to any post.

7. She averred that interested party's scope of representation includes the sector of representation envisioned by the proposed union and contended that the appellant did not adduce any proof that they have suitable provisions or any peculiar sectoral advantage to protect and promote the respective sectoral interests of the employees sought to be represented as opposed to the representation of the Interested Party. She maintained that, in deciding whether or not to register a union, all that is required is to be satisfied that the intended sector of coverage is either sufficiently represented or not.

8. On the other hand, the respondent contended that there is no legal requirement under the Labour Relations Act to grant the appellant an opportunity to be heard before making a decision on whether or not to register a trade union. She contended that she has no obligation to go beyond her responsibility as set out in the Act, to hear the Appellants. She therefore contended that the appeal lacked merit hence should be dismissed with costs.

Interested party's case

9. The interested party averred that the right to form trade union is not absolute as envisaged under Article 25 of the Constitution but subject to limitation as provided for in a statute, namely the Labour Relations Act. She contended that section 14 of the Act sets out the requirements of registration of trade unions and it prohibits registration of a trade union where there exists another union catering for the same members that the proposed union intends to represent and advocate for their rights. She contended that she represents all employees of the county governments across all departments and under all cadres irrespective of their ranking provided they are unionisable employees under the prevailing labour laws. She contended that the Collective Agreement negotiated by her covers all employees and makes no distinction on whether they are junior or senior employees.

10. She denied that the county government administrators are currently not covered by her and averred that many of them are active members holding office in their respective branches. She denied that the respondent infringed anyone's constitutional rights by refusing to register the

proposed union and contended that the refusal was justified because the registrar was satisfied that the intended sector was sufficiently represented. She contended that registering another union in the sector would affect all the employees because none of the two unions would recruit a simple majority to qualify for recognition by the employers under section 54 of the Labour Relations Act.

11. The appeal was disposed of by way of written submissions with the appellant filing her submissions.

The Appellant's Submissions

12. The appellant submitted that the respondent never considered the provisions of section 14(2) of the Labour relations Act but only section 14(1) of the Act in refusing to register the proposed union. He contended that the respondent considered the sectoral requirement of the proposed union *vis a vis* her constitution and the inadequacy of the Interested Party to represent the county administrators. He contended that the registrar did not consider whether the union's constitution provided for safeguards.

13. He relied on **Seth Panyako & 5 others v Attorney General & 4 others [2013] e KLR** where the court held that under section 14(2) of the Act the Registrar has to consider the constitution of the union to determine if it contained suitable safeguards to protect and promote the respective sectoral interests of the employees.

14. He further submitted that the respondent made the impugned refusal without according him opportunity to present his case on the issue of sufficiency. He further relied on the **Seth Panyako case, supra**, where the court held that the Registrar ought to seek evidence before determining whether the interests of the proposed trade union are sufficiently represented by another union already registered.

15. He maintained that there was no basis for impugned decision to register the new union. He contended that the registrar did not demonstrate by her pleadings how many administrators are represented by the interested party. He further contended that the alleged sufficiency was not supported by documentary evidence. He contended that the respondent did not consider whether the interested party could sufficiently represent the interests or substantial portion of the interests of the Administrators in the industry. He maintained that there is no single sector specific union that represents administrative sector in Kenya.

16. He relied on **Peterson Wachira & another v Registrar of Trade Unions & 3 others [2017] e KLR** where the existence of another union is no basis for refusal to register a new union in the same sector. He maintained that an inquiry ought to have been conducted by the respondent and outlined in the notification of the refusal of the registration. He urged that the failure to do so violated Article 47 of the constitution and section 3(b) of the Fair Administrative Actions Act on the right to be heard before an administrative decision.

17. He further submitted that the freedom of association is guaranteed under Article 36 of the constitution and it can only be limited by dint of Article 24(1) of the constitution. That the said limitation can only be by law, and it must be reasonable and justified, in an open and democratic society based on human dignity, equity and freedom taking into account all relevant factors. She contended that under Article 24(3) the burden of proof is on the state or the person seeking to justify a particular limitation to demonstrate to the court that the requirements stipulated under Article 24(1) have been satisfied.

18. She contended that the respondent did not discharge her burden of proving that the limitation herein is by law; that it is justified in an open and democratic society based on human dignity, equality and freedom among others. Again he relied on **Seth Panyako case, supra** for emphasis.

The Respondents' Submissions

19. The respondent submitted that Registration may refuse to register a new trade union if a particular sector is already represented elsewhere. She contended that Section 14(1) (d) of the Labour Relations Act limits the powers of the Respondent herein to register a trade Union in Circumstances where there is in existence another trade Union which is sufficiently representative of the whole or a substantial proportion of the interests in respect of which the Appellants seeks to be issued with certificate of recruitment with a view of being registered as a Trade Union.

20. She further urged that the right to join and form a Trade Union is not absolute and relied on Charles **Salano & 9 Others vs. The Registrar of Trade Unions & Another (2015) eKLR** for emphasis.

21. She submitted that the enjoyment of freedom of association by the Appellants as enshrined in the Constitution of Kenya 2010 under the Bill of Rights is limited to the extent that their enjoyment shall not be prejudicial to other Party's rights. She urge the court to find that the public interest supersedes the private claims of an individual and relied on **Kenya Guards & Allied Workers Union-vs-Security Guards Services and 38 others and Another (IP) H.C. Misc. 1159 of 2003**, for emphasis.

22. The respondent further submitted that registration of the Appellants proposed union would be tantamount to encouraging encroachment upon the turf of registered and established Trade Unions where the workers are catered for. She further submitted that her office should not be seen to contribute to confusion and Union rivalries which may harm the harmonious Industrial relations existing in the Sector. She reiterated that the enjoyment of freedom of association by the Appellants as enshrined in the Constitution of Kenya 2010 under the Bill of Rights is limited to the extent that their enjoyment shall not be prejudicial to other Party's rights. She therefore contended that Appeal lacks merit and prayed for the same to be dismissed with Costs to the Respondent.

Interested party's submissions

23. The interested party contended that her constitution provides for representation of all county government workers irrespective of position or profession or any exception. She denied that she only represents the junior employees of the county governments and maintained that her

scope of representation spreads across the board. She contended that if the new union was registered, she would recruit members from the existing union. She relied on **Odiaga v Registrar of Societies** [unreported] where the court dismissed a similar appeal because the appellants were seeking to register new union not because their interests were not represented but because they were dissatisfied with the management of the existing union.

24. She further submitted that the refusal to register the appellant's union was justified and within the provisions of section 14(1) (d) of the Labour Relations Act which gives the Registrar discretion to refuse registration where there exists another union that sufficiently covers the sector. She urged that the import of such discretion is to ensure that there is no proliferation of small and weak unions in a sector which cannot meet the threshold for recognition. For emphasis, she cited of section 54 of the Act which requires that recognition is only to be given to a union that represents a simple majority of the unionisable staff of the employer.

25. She relied on **Angaha v Registrar of trade unions [1973] EA 297, 307** where Muli J upheld the Registrar's refusal to register a union and observed that the discretion was properly exercised because the Registrar had a duty to satisfy herself that the policy laid down under the constitution and the safeguards by the statute law was not infringed. She further relied on **Tera Aduda and 6 others v Registrar of Trade unions [1978] eKLR**, **kenya Health Profssionals Union v Registrar of Trade unions & another [2015] e KLR**, **Joel Mbuthia & 2 Others v Registrar of Trade Unions & another [2018] e KLR**, and **Aviation and Airports Services Workers union v Registrar of trade unions[2016] e KLR** where the court also found that the Registrar had properly exercised discretion in refusing to register a new union where there was another union already in existence.

26. She further relied on **Charles Salano &9 others v The Registrar of Trade Union & another [2015] e KLR** where the court held that the right to form a union is not absolute but can be limited and regulated under Article 24 of the Constitution. She urged that registering the appellant's union will lead to unnecessary feuds with her over basic matters relating to membership and prayed for the appeal to be dismissed.

Issues for determination

27. After carefully considering the pleadings, affidavits and submissions presented by both parties, the following are the issues for determination: -

- a. Whether the freedom of association, and right form trade union is absolute.
- b. Whether the 1st Respondent's refusal to register the appellant was justified and within the law.
- c. Whether the appellant is entitled to the reliefs sought.

Whether the freedom of association, and right form trade union is absolute.

28. The respondent and the interested party contended that the freedom of association and the right to form trade union as envisaged under Article 36 and 41 of the constitution are not absolute. Although the appellant contended that the respondent has the burden of proving that the limitation of the said freedom and right by section 14 of the Labour Relations Act is reasonable and justified, I wish to state that the Court of appeal has already determined that section 14 of the said Act limits the freedom of association under Article 36 and the right to form a trade union under Article 41 as required by Article 24 of the constitution.

29. In **Charles Salano & 9 Others vs. The Registrar of Trade Unions & Another (2015) eKLR** the Court of appeal held that: -

“...we are not convinced by the appellants' submissions on the application of Article 36 and 41 (2) (c) of the Constitution which provides for the freedom of association and the right to laour relations, for two reasons: - Firstly, the alleged breach of the appellants' rights do not fall within the confines of Article 25 of the Constitution which expressly sets out fundamental rights and freedoms which may not be limited; and secondly, Article 24 (1) of the constitution sanction the limitation of fundamental rights and freedoms in the following terms:

...

In our view, we find and hold the limitation of the appellants' rights under Article 36 and 41 of the Constitution to be reasonable and justified in an open and democratic society.”

Whether the 1st Respondent's refusal to register the appellant was justified and within the law.

30. The Notification of refusal of registration dated 20.5.2019 by the respondent stated as follows: -

“It is notified that the registration of KENYA COUNTY ADMINISTRATORS UNION as a trade union under the Labour Relations Act is refused. The grounds of refusal are as follows:

- 1. The cadre of representation sought being every administrator employed by a county Government vider the County Government Act 2012, is already represented by the existing registered union of Kenya County Government Workers Union(KCGWU). KCGWU represents all cadre of officers employed by the County Governments in any capacity or to any post. Membership to the union is therefore open to all cadre of officers, including the county**

administrators.

Under the provisions of section 14(1)(d) of the Labour Relations Act, the Act provides that a trade union may apply for registration if no other trade union is sufficiently representative of the whole or of a substantial proportion of the interest in respect of which the applicants seek representation. The proposed scope of representation is thus sufficiently represented.”

31. The respondent contended that she consulted the National Labour Board before issuing the foregoing notification in line with section 31(3) of the Labour Institutions Act during its meeting on 10th-11th May 2019 and the Board opposed the registration of the appellant’s union. The respondent further contended that the KCGWU sufficiently represents the interests of all the employees of County Governments regardless of their position or profession. Interested party has confirmed as much and added that some of the administrators targeted by the Appellant are already members and branch officials of the KCGWU. The appellant has however contended that the County Administrators have special interests which are unique to themselves and which are not sufficiently represented by KCGWU. According to him KCGWU represents junior only while the proposed union targets senior staff.

32. I have carefully considered the material presented to the court and the written submissions by counsel. There is no dispute that the respondent refused to register that appellant’s union on ground that there is already in existence another trade union, KCGWU, which represents employees in the County governments. The respondent’s and the interested party’s contention that the KCGWU sufficiently represents all the employees in the sector regardless of position and profession has not been rebutted by the appellant. He did not adduce any evidence to prove that KCGWU represents only the junior staff of the County Governments excluding the Administrators. I therefore find that the respondent has proved that the refusal to register the proposed union was justified and within the law.

33. Section 14 (1) of the Labour Relations Act provides

“The Registrar may, in his discretion, refuse to register any trade union or probationary trade union if he is satisfied that ...

(d) Any other trade union already registered is-

(i) in the case of a grade of employee or employees, sufficiently representative of the whole or a substantial proportion of the interest of which the applicants seek registration; or ...

Provided that the Registrar shall, by notice in the Gazette or otherwise, notify any registered trade union which appear to him to represent the same interests as the applicants of the receipt of such application and shall invite the registered trade union concerned to submit in writing within a period to be specified in the notice any objection which such trade union may wish to make against the registration.”

34. The appellant has not shown that the respondent acted ultra vires or illegally. He has also no proved that the respondent did not follow the procedure set out under section 12, 13, and 14 of the Labour Relations Act and section 31(3) of the Labour institutions Act. I therefore find and hold that the respondent exercised her discretion properly and procedurally before refusing to register the appellant’s union. She evaluated the application, considered the policy as set out in the Constitution and section 14 of the Labour Relations Act, consulted the National Labour Board, and then formed that opinion that the interests for which the appellant seeks to represent are Sufficiently or substantively represented by an already registered union in the sector.

Whether the appellant is entitled to the reliefs sought.

35. In view of the finding herein that the fundamental rights and freedoms under Article 36 and 41 of the Constitution are not absolute and that the refusal to register the appellant’s union was justified and within the law, I see no merits in the appeal and proceed to dismiss with costs.

Dated, signed and delivered in open court at Nairobi this 29th day of April, 2020.

ONESMUS N. MAKAU

JUDGE