



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

APPEAL 19 OF 2019

KENYA NATIONAL UNION OF ENGINEERS.....APPELLANT

VERSUS

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

THE NATIONAL LABOUR BOARD.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

1. This appeal was instituted by the Memorandum of Appeal filed on 18.6.2019 which was later amended on 11.9.2019. The appeal is against the 1st respondents' refusal to register the appellant as a trade union. The refusal was communicated vide the letter dated 24.5.2019, issued pursuant to section 14 (1) of the Labour Relations Act. The appellant seeks the following orders-

- a. That the decision of the Registrar of Trade Unions made on 24th May 2019 refusing to register the appellant as a trade union be set aside.
- b. That the registrar of trade unions be directed to register the appellant as a trade union.
- c. That the cost of this appeal be paid for by the Respondent.

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

- a. The 1st Respondent erred in refusing to register the appellant union when there was no objection from other unions against the registration of the union.
- b. The 1st Respondent erred in applying a sectoral approach in her refusal to register the appellant union yet its constitution contained provisions by which the various and unique interest of its members would be catered for irrespective of the sector in which they were employed or were working.
- c. The 1st Respondent erred in failing to notify the appellant on the nature of the objections raised to its registration as a trade union, and by failing to invite the appellant to respond to those objections.
- d. The respondent failed in her statutory duty by refusing to register the appellants proposed union without demonstrating how the sector the appellant sought to represent, had been sufficiently represented by the alleged existent union.
- e. The Respondent erred by failing to appreciate the pivotal role played by the National Labour Board in the registration of trade union, which is to the effect that the Labour Relations Act allows for the formation of trade unions on the basis of industry sector; before rejecting the application.
- f. The 1st Respondent erred in fact and in law by failing to appreciate the wording of section 14 of the Labour Relations Act which is couched in mandatory terms and is designed to properly regulate the 1st Respondent's discretion in exercising her statutory duty. As such, her decision was ultra vires as she acted of her own volition.

3. The appeal was opposed by the 1st Respondent vide her Affidavit sworn on 14.11.2019.

The Appellant's Case

4. The Appellant avers 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. It is averred, that 1st respondent failed to conduct her due diligence in alleging that the cadre of workers that the Appellant seeks to represent was sufficiently represented by KNUE yet the 2017 diary represents that 2389 members prospecting to 20,000 registered by the Engineers Board of Kenya and Kenya Engineering Technology Board.

5. The 1st Respondent failed to appreciate that the content of sufficiency as stipulated in section 14 (1) (d) of the Labour Relations Act 2007 can only be interpreted by section 54 of the Act which contemplates sufficiency as simple majority. This would mean that KNUE does not meet this qualification having managing to represent barely 265 of the workers in the sector since 1952.

6. The Appellant avers that the 1st respondent failed to disclose the source of advice which informed her decision to refuse the registration of the proposed trade union.

7. The Appellant avers that KNUE (Kenya National Union of Engineers) has not entered into a recognition agreement with employers of employees from the following unions: Union of Kenya Civil Servants, Kenya Electrical Trade and Allied Workers Union, Railways Workers Union Kenya, Kenya Engineering Workers Union, Dock Workers Union, Communication Workers Union Kenya, Kenya Aviation Workers Union, Aviation Airport Services Workers Union, National Union of Water and Sewerage Employees, Kenya County Government Workers Union and Kenya Petroleum Oil Workers Union.

8. On the other hand, the appellant avers that it has recruited employees who are members of these unions, as part of workers it seeks to represent as the unions do not represent them sufficiently. It is the Appellant's position that the section 4 (1) (a) (b) and (c) gives her the unalienable rights to form a trade union as emphasized under article 41 (2) (c) of the Constitution which can only be limited using the criteria set out in article 24 (1) (c) and (e) of the Constitution.

The 1st Respondent's Case

9. In her affidavit, the 1st Respondent confirms that indeed the appellant applied for registration of Kenya National Union of Engineers as a trade union. She avers that upon receipt of the same, she issued a notice vide gazette notice 9908; to all trade unions, federations of trade unions and employers' organizations, concerning the said application.

10. As a result, an objection was raised by Amalgamated Union of Kenya Metal Workers against the Registration of the union and the appellant was duly notified vide the letter referenced MEACL & SP/TU/R/219/15 dated 30.10.2017. She contends that paragraph 2 of the memorandum of appeal is untrue as the appellant responded to the objection through its letter of 3/11/2017.

11. It is the 1st Respondent's position that she sought advice from the 2nd Respondent at the meeting held between 10th and 11th May 2019 and it was established that the appellant's intended scope of representation was already sufficiently represented by the existing registered trade union hence a proposal was made by the 2nd Respondent to the 1st Respondent, not to register proposed union. Consequently, in her letter of 24.5.2019, the 1st Respondent communicated to the appellant on her decision not to register the union.

12. The 1st Respondent is of the view that the creation of a new union based on academic qualifications and not on the sector would create a proliferation of new trade unions to represent different grades under the same employer, leading to total disarray in the labour relations administration. Further, that the appellant has not been registered hence does not exist thus cannot file this appeal on behalf of the promoters as it is not a legal person capable of suing and being sued. Finally, she urged that the appeal lacked merit hence should be dismissed with costs.

13. The appeal was disposed of by way of written submissions with the appellant filing her submissions on 28.11.2019 while the 1st Respondent filed hers on 14.1.2020.

The Appellant's Submissions

14. The appellant submits that there was no objection from the existing unions even though they had been invited to do so vide a gazette notice, hence the 1st Respondent had no reasonable justification to refuse to register the union. They view this refusal as a violation of articles 36 and 41 of the Constitution and section 5 of the Labour Relation Act, as engineers will be compelled to join unions that do not represent their interest. The Appellant gives the examples of KUPPET, KNUT, KUDHEIHA and the Kenya Union of Secondary School and None Teaching Staff which are in the same sector and recruit members based on qualifications.

15. They rely on the case of **Seth Panyako & 5 Others vs. Attorney General & 2 Others [2013] eKLR** where the Court was of the view that the Registrar's refusal to register the Kenya National Union of Nurses upon satisfying the requirements of section 12 and 18 of the Labour Relations Act was unreasonable, unjustifiable and contrary to article 41 (2) (c) of the Constitution.

16. The Appellant submits that having recognized that engineers are multi-sectoral, the 1st Respondent ought to have considered section 14 (1) (d) of the Labour Relations Act which allows the registrar to register a trade union consisting of persons working in more than one sector. It is submitted that the proposed union consists of engineers drawn from the private and public sectors hence the 1st Respondent ought to have considered the proposed union's constitution to determine if it contained suitable safeguards to promote and protect the respective

sectoral interests of the employees.

17. Appellant submits that 1st Respondent made the decision without according them a hearing hence violated their right to fair administrative action as provided for under article 47 of the Constitution.

18. The Appellant submits that the 1st Respondent based her refusal on section 14 (1) (d) of the Labour Relations Act which has its basis in section 80 of the repealed Constitution, these are inconsistent with the Constitution, 2010. The Appellant is of the view that the limitations of rights under the Constitution does not advocate for a blanket denial of a right. It is submitted that article 24 of the Constitution applies to the Defence forces sector.

The Respondents' Submissions

19. The Respondents submit that the appellant does not have the *locus standi* to file this appeal as she has not been registered as a trade union hence not a legal person. She relies on the case of ***Housing Finance Company of Kenya Limited vs. Embakasi Youth Development Project [2004] eKLR*** where the Court held that only a juristic person endowed with a legal personality can have *locus standi* and be the subject of rights and liabilities.

20. The 1st Respondent further submits that the decision not register the appellant was proper and within the powers accorded by law, as section 14 (1) of the Labour Relations Act allows the refusal to register a trade union where another trade union exists which is sufficiently representative of the whole or substantial proportion interest. This was also the holding in ***Kenya Tea Workers Union & 7 Others vs. Registrar of Trade Unions [2001] eKLR***. They also rely on the case of ***Charles Ogutu & 2 Others vs. Registrar of Trade Unions [2018] eKLR*** where the Court held that the intended union and the Kenya Union of Sugar Plantation and Allied Workers were sufficiently similar in name and scope of operation and to allow the appellants to continue with their intention would create confusion and conflict in a sector which has a union sufficiently representative of the interests that the appellants intended to represent.

21. Further, it is submitted that the 1st Respondent relied on the 2nd Respondent's advice that the appellant's interests were well catered for by the already registered trade unions. It is the Respondents' position that registration of another trade union would create disharmony between the appellant and the registered trade unions.

22. The Respondents submit that the rights under articles 36 and 41 of the Constitution are not absolute and can be limited as set out in article 24 of the Constitution. They further submit that the Appellant has not demonstrated the prejudice it stands to suffer if the union is not registered.

23. Finally, the urge this Court to give directions regarding the costs of this suit as it deems fair.

Analysis

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

- a. Whether the Appellant lacks *locus standi* to bring the appeal.
- b. Whether the 1st Respondent's refusal to register the appellant was justified.
- c. Whether the appellant is entitled to the reliefs sought.

Locus Standi

25. The Respondents have submitted that the appellant does not have the *locus standi* to file this appeal as she has not been registered as a trade union hence not a legal person.

26. ***Black's Law Dictionary***, 9th Edition (page 1026) defines *locus standi* as "***the right to bring an action or to be heard in a given forum***". The Court in ***Alfred Njau & 5 others vs. City Council of Nairobi [1983] eKLR*** also defined *locus standi* as follows-

"The term locus standi means a right to appear in Court and, conversely, as is stated in Jowitt's Dictionary of English Law, to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding."

27. An applicant for registration of a trade union lacks status of a body corporate until the application is granted and a certificate of registration issued by the Registrar of trade unions under Section 19 (1) of the Labour Relations Act after consulting the National Labour Board. Section 21 of the Act provides as follows-

A trade union, employers' organisation or federation shall be registered as a body corporate—

- (a) with perpetual succession and a common seal;***
- (b) with the capacity in its own name to—***

(i) sue and be sued; and

(ii) enter into contracts; and

(c) hold, purchase or otherwise acquire and dispose of movable and immovable property. (Emphasis mine).

28. In this case the appellant brought this appeal in person after the certificate of registration was refused by the Registrar. It follows therefore that by dint of section 21 of the Act, the Appellant filed this appeal without having the legal capacity to do so. I am of the view that the proper way of invoking this Court's jurisdiction would have been through instituting the appeal through its promoters. The Court in *Housing Finance Company of Kenya Ltd v Embakasi Youth Development Project* [2004] eKLR observed as follows-

“...only a juristic person, that is an entity endowed with legal personality, can have locus standi before the Court, and can be the subject of rights and liabilities as may be declared by the Court. Court orders are not made in vain and are intended to be executed. Such execution is only possible in relation to entities endowed with legal personality. It follows that the notion that an entity lacking legal personality can seek orders of the Court or become the bearer of rights or liabilities declared by the Court, is totally inconsistent with the character and modus operandi of the Courts in the common law system. In this system, judicial orders may only be made where they are assured of enforcement and this assurance is secured by the effectiveness of the law relating to contempt of Court.”

29. In light of the foregoing matters, I am of the view that the appellant did not have the *locus standi* to institute this appeal. Without a competent litigant to present this appeal, I return that the appeal is incompetent and the court's jurisdiction has not been properly invoked. I therefore decline the invitation to determine the appeal on merits and instead dismiss it with no costs. Awarding costs against a non-existent person would be in vain.

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

ONESMUS N. MAKAU

JUDGE