



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 77 OF 2017

(Consolidated with Appeal No. 11 of 2016)

(Before Hon. Justice Hellen S. Wasilwa on 29th January, 2019)

FRANCIS W. NGARRIUKU

ZAKAOYO CHEPKONGA

AMOS KARIMI MWETHIA

MOSES CHEPKWONY

DAVID MUSANGI BEKETI

SAMUEL MOSES KWEYU

PURITY WANJOGU

FRANCIS MWANZIA MAWEU

PURITY M. KURIA

DANIEL MUTUNGA KIMOTHO

GEOERGE NGARIU NDUNGU

JOHN KAERI

ZACHARIA J. MZEE

JOHN CHELIMO

BENJAMIN TELITEI

MOHAMED MUMIN YUSSUF

JANNET L. AYUA

KELLEN KAIMEI KIRIMI (all suing as the proposers of

THE PROPOSED PUBLIC SERVANTS UNION.....APPELLANTS

VERSUS

THE REGISTRAR OF TRADE UNIONS.....RESPONDENT

JUDGEMENT

1. The Appellants, all suing as the interim officers and proposers of the Proposed Public Servants Union, filed a Memorandum of Appeal dated 17th May, 2016 brought under *Section 30 of the Labour Relations Act of 2007*, being an appeal of the decision of the Registrar of Trade Unions refusing to register their trade union and with the Union of Kenya Civil Servants appearing as an Interested Party.

2. That Public Servants Union is a proposed trade union awaiting formal registration after applying for a certificate of registration in November 2011 as per **Section 12 of the Labour Relations Act**. That they were authorized by the Respondent in a notice dated 21/11/2011 to undertake lawful activities in order to establish a trade union which they formally did vide a letter on the same date by applying for registration of their union and making a payment thereto. That they attached to the application their proposed constitution, identities of their interim leaders and names and personal numbers of the founding members together with the initial minutes at which the resolution to form the Union was mooted.

3. Further, that they also filled the Statutory Application form 'Form A' for registration and the Respondent then proceeded to publish their Application in the Kenya Gazette on 10/02/2012 under *Gazette Notice Number 1566* which was to serve as notice to various registered trade union to submit their objections if any.

4. That the Interested Party then filed an objection dated 13/02/2012 which they responded to in their letter dated 03/04/2012. That since the Respondent took a long time to make a decision, they filed a Petition which this Court found in their favour and that the court ordered the Registrar to make a decision within a limited time. That they subsequently received a letter from the Respondent dated 19/04/2016 which contained a notification of refusal to register dated the same day. Their Appeal is based on the grounds that:-

a) The Respondent's actions of refusal to register are contrary to Article 36(1) of the Constitution of Kenya which provides for the right to freedom of association including the right to form, join or participate in the activities of an association of any kind.

b) The Respondent's actions are contrary to Article 36(3) (a) and (b) of the Constitution of Kenya on the registration of an association of any kind and which should not be withheld or withdrawn unreasonably and that there is a right to fair hearing before the registration is cancelled.

c) The Respondent's actions are contrary to Article 41(2) (c) of the Constitution where forming, joining or participating in the activities and programs of a trade union are one of the constitutional rights of any worker.

d) The Respondent's actions are contrary to Article 47(1) of the Constitution that entitles the Appellants to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

e) There is a violation of the Appellant's right of receiving a written response and proper reason for the refusal or otherwise to register the proposed union.

f) Despite and/or in spite of the Appellant's application for registration of the trade union being in accordance with the law both substantively and procedurally, the Respondent has used ulterior, unwarranted and unjustifiable reasons to reject the Appellants' application.

g) The Appellant's application for registration of the trade union was in line with and conformed to Sections 12, 13 and 18 of the Labour Relations Act of 2007 and there is no legal justification for rejection of the Appellant's application.

h) On the contrary, the Respondent's refusal to register the Union was contrary to Sections 19 and 20 of the Labour Relations Act of 2007 which provides that the Registrar shall issue a Trade Union with a certificate if he is satisfied with their Application for registration or if dissatisfied he shall inform the Trade Union of the refusal in the Statutory form; Form D.

i) The Respondent failed to take into account the Court's decisions in regard to the considerations for registration or refusal of registration of a trade union and made a biased decision.

j) The decision runs contrary to the current trends and Court decisions.

k) The Respondent took into account irrelevant considerations and failed to take into account relevant factors in making her decision.

l) The Appellant's Union covers an unmet area and need and even in the unlikely event it does not, the courts have held that the constitutional right to form and join a Union of choice is supreme and an overriding issue over other considerations.

m) The decision to refuse registration based on the existence of a union representing the whole or a substantial portion of the persons the Appellants seek representation is wrongful, unlawful, illegal, unconstitutional and contrary to the norms of a modern democratic society.

n) The decision to refuse registration solely based on the advice of the national labour board is contrary to the independence of the office of the Registrar of Trade Unions.

5. The Appellants seek for:-

- a) *A declaration that the Registrar of Trade Unions' decision to refuse to register The Public Servants Union is unlawful and unconstitutional and thus null and void and of no legal effect.*
- b) *An order to issue compelling the Registrar of Trade Unions to register The Public Servants Union by issuing a Certificate of Registration to the Appellants.*
- c) *An injunction to issue restraining the Respondent from revoking the proposed union's certificate to operate as a proposed union.*
- d) *The Respondent be condemned to meet the costs of this appeal.*
- e) *Any other further or better relief that this court may deem fit.*

6. The Respondent filed its Replying Affidavit dated 04/07/2018 sworn by E.N. Gicheha who admits that the Appellants undertook registration of their proposed trade union with it averring that there was some delay in the processing of their application because the term of the National Labour Board had then expired. That since it took time before a new board was appointed, she was bound by law to present the Appellant's application before the Board for consideration before registration and that this is what caused the delay upon which the Appellants filed a Petition in Court. That the new Board dealt with the application during its meeting held on 7th and 8th April 2016 and made a considered opinion that the category of workers the Appellants sought to represent was already represented by the Union of Kenya Civil Servants (UKCS), the Interested Party herein and that the same was communicated to the Appellants accordingly.

7. The Interested Party filed its Reply to Memorandum of Appeal dated 22/06/2018 denying the Appellants' grounds of appeal in the Memorandum of Appeal. It avers that the decision by the Respondent to refuse to register the proposed trade union was a discretion properly and lawfully exercised pursuant to **Sections 4, 14, 18 and 20 of the Labour Relations Act** and that there was no breach of the Constitution nor a violation of the provisions of the Labour Relations Act as averred by the Appellants. That its Objection dated 13/02/2012 on the registration of the proposed union still stands and is inter alia to the facts that:-

- i) *The sector which the proposed union intends to be registered in (civil service) is already sufficiently represented by about 2 other union together with the Interested Party herein.*
- ii) *The proposed union has a name almost similar to that of the Interested Party.*
- iii) *The sponsors of the proposed union are members and or former members and or former officials of the Interested Party, some of who are disgruntled having lost previous elections of the Interested Party and are out to form splinter unions, to serve selfish narrow interests.*
- iv) *The Interested Party was formally recognised by the Government of Kenya 2004 and has embarked on serious Collective Bargaining Agreement with the said Government on behalf of the members.*
- v) *The proposed Secretary General of the proposed union is unfit to hold public office having been involved in fraud while serving as an official of the Kenya Civil Servants Welfare Association.*

Appellants' Submissions

8. The Appellants submit that the right to freedom of association and the right to fair labour practices are in the Bill of Rights which applies to all law and binds all state organs and all persons through **Article 20(1) of the Constitution of Kenya**. That the right to form, join or participate in the activities and programs of a trade union is restated in **Section 4 (a) (b) and (c) of the Labour Relations Act** and that the Respondent is ultimately bound by the provisions of the Bill of Rights. Further, that the actions or inactions of the Respondent has negated the rights of the Appellants and those they recruited as members because they cannot enjoy the benefits of membership in the absence of registration.

9. That in establishing the reasonableness and justifiability in limiting them, their fundamental rights as per **Article 24(1) of the Constitution**, this Court should apply the principles established by Justice Nduma Nderi in **Seth Panyako & 5 Others -v- Attorney General & 2 Others [2013] eKLR** which included:-

- a) *the nature of the right;*
- b) *the importance of the purpose of limitation;*
- c) *the nature and extent of the limitation;*
- d) *the need to ensure the enjoyment of rights by any individual does not prejudice the rights of other; and*
- e) *the relation between the limitation and its purpose and whether there are less restrictive means to achieve this purpose.*

10. Further, that they exercised their freedom to associate as provided in the Constitution and in line with the provisions of the Labour Relations Act as regards the application for registration of a trade union. That the Respondent declined to make an independent decision and instead rubber stamped the decision of the National Labour Board on irrelevant considerations outside the constitutional mandate. That the Courts have increasingly reversed the decisions of the Registrar of Trade Unions not to register a trade unions such as the case of **Seth Panyako –v- Attorney General** above where the court registered a trade union after there had been a delay by the registrar to issue a certificate of registration.

11. Further, that the courts have also taken a dim view on objections raised by unions such as the Interested Party herein and that it is wrong for the Respondent to refuse to issue a certificate based on objections or illegitimate interests of such a union. They rely in the case of **Japheth Anyira Agura & 6 Others –v- Registrar of Trade Unions [2014] eKLR** where Justice Rika noted as follows:-

“...The purpose of inviting objections publicly is meant to assist the Registrar, in determining if proposed trade union registration would conflict with the interests sufficiently represented by another Trade Union, resulting in demarcation disputes and industrial disharmony. In the absence of objections filed with the Registrar, he has no reason to scour his registry for constitutions of the various Trade Unions which have not lodged any objection, with the intention of assessing if they are sufficiently representative...”

12. That the Respondent ought to be reasonable and forward looking and should have dissected what sufficiency of representation is as was noted by Justice Rika in **Kenya Concrete, Structural, Ceramic Tiles, Wood Plys and Interior Designs Workers Union –v- Registrar of Trade Unions & another [2013] eKLR** where he later registered a union after observing that:-

“This Court is not persuaded that the Interested Part is sufficiently representative of the huge and vibrant, building sector in Kenya. Every morning and evening in any corner of this country, one is encountered by young men and women going to or coming from ‘mjengo’ or construction sites. This is the area the two protagonists are battling over. It is a huge area, dynamic, and as suggested in an earlier decision of this Court, such dynamism brings with it new means of production and new forms of labourers. This is the reason the Court advised in the Kenya Tea Workers Union decision, that in making enquiries whether registration is merited, the Registrar should not be unreasonably narrowed and restricted....”

The Appellants have demonstrated that they were not treated fairly and reasonably by the National Labour Board. While the court agrees that Section 14(1) (d) (i) is a valid legislation in regulation of the exercise of freedom of association, the Registrar of trade unions did not exercise his role independently, judiciously and fairly in denying the Appellants registration of their trade union.

.....The Court feels that considering the organization and structure of the Interested Party, it may not have the capacity to sufficiently represent the rising number of workers in the sector. The Registrar was narrow and restricted in denying the Appellants’ Trade Union registration.”

13. The Appellants finally submit that the Respondent failed to take cognizance of the **International Standards of Classification of Economic Activities** which call for one trade union for a Sector and the spirit of the **ILO Convention No. 87** and the **Industrial Relations Charter**. That the Respondent failed in her duty and erred in law and in fact by ignoring the current decisions of this Honourable Court and that she seems to want the trend of registration of trade unions through court orders in spite of the existence of other unions in the same sector. They urge the court to allow this appeal as pleaded with costs.

Respondent’s Submissions

14. The Respondent submits that the Board advised her to refuse registration thereof as stipulated in **Section 31(3) of the Labour Institutions Act** and **Section 19 of the Labour Relations Act** and that she was therefore legally bound by the said advice. Further, that **Section 14(1) (d) of the Labour Relations Act** limits the powers of the Respondent to register a trade union where another exists and which is sufficiently representative of the whole or substantial portion of the interest in respect of which the Appellants seek registration.

15. That the Constitutional right to freedom of association is not absolute but is subject to statutory limitation and that the Appellants’ right should not be prejudicial to the rights of others. That the Court should find that public interest supersedes the private claims of an individual as called in aid in the case of **Kenya Guards & Allied Workers Union –vs- Security Guards Services & 38 Others and Another (IP) H.C Misc. 1159 of 2003** where Justice Nyamu as he then was expressed himself in a similar manner and further stated that Public Interest must be the engine of the millennium and it must where relevant, occupy center stage in the Courts. That issuing a registration certificate to the Appellants’ proposed union would be tantamount to encouraging encroachment upon the turf of registered and established Trade Unions and that she should not be seen to contribute to confusion and union rivalries.

16. It is submitted by the Respondent that the protection of workers and employers rights as a collective is provided for under **Article 41 of the Kenyan Constitution, International Laws and ILO Conventions** and that the right is however not absolute and can be limited or regulated in context of **Article 24 of the Constitution**. She relies in the case of **Charles Salano & 9 Others –v- the Registrar of Trade Unions & another, Civil Appeal No. 19 of 2016** where the Court found and held the limitation of the appellants’ rights under Article 36 and 41 of the Constitution to be reasonable and justifiable in an open and democratic society because the Appellants’ interests were already sufficiently represented by an existing trade union. Further, that the creation of a rival trade union would create confusion in the area the appellant intended to represent.

17. The Respondent submits that the general rules of International Law cannot be gratuitously applied without reckoning with the constitutional imperatives laid out by the Kenyan Constitution. That ILO Convention 87 resonates with Articles 36 and 41(2) (c) of the Constitution which is subject to limitation as per Article 24(1) and (3) of the Constitution and that the said Convention is therefore of no utility in this instant case. She believes that the Appeal does not disclose a cause of action against the Respondent, is without merit and an

abuse of the court process and that the Court should uphold the Respondent's decision while dismissing the instant appeal with costs.

18. I have examined all the averments and submissions of the parties. The relevant law that determines the consideration the Registrar of Trade Union has to rely on before refusing registration of a trade union is Section 14(1) of the Labour Relations Act which states as follows:-

1) A trade union may apply for registration if:-

(a) the trade union has applied for registration in accordance with this Act;

(b) the trade union has adopted a constitution that complies with the requirements of this Act, including the requirements set out in the First Schedule;

(c) the trade union has an office and postal address within Kenya;

(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 proportion of the interests in respect of which the applicants seek registration; or

(ii) in the case of an association of trade unions, sufficiently representative of the whole or a substantial proportion of the trade unions eligible for membership thereof;

Provided that the Registrar shall, by notice in the Gazette and in one national daily newspaper with wide circulation, notify any registered trade union, federation of trade unions or employers' organisations which appear to him to represent the same interest as the applicants of the receipt of such application and shall invite the registered trade union federation of trade unions or employers' organisation concerned to submit in writing, within a period to be specified in the notice, any objections to the registration;

(e) subject to subsection (2), only members in a sector specified in the constitution qualify for membership of the trade union;

(f) the name of the trade union is not the same as that of an existing trade union, or sufficiently similar so as to mislead or cause confusion;

(g) the decision to register the trade union was made at a meeting attended by at least fifty members of the trade union;

(h) the trade union is independent from the control, either direct or indirect, of any employer or employers' organisations; and

(i) the trade union's sole purpose is to pursue the activities of a trade union.

19. The consideration range from there being proper application as per the law to being in place a proper office and postal address within Kenya and there should be no other trade union which sufficiently represents the whole or a substantive preposition of the interests the Applicants seek to register.

20. Indeed the name of the proposed trade union should not be the same or substantially similar so as to mislead or cause confusion.

21. In refusing to register the Applicant herein, the Registrar of Trade Union indicated in her letter as follows:-

“the Board observed that Public Servants are already represented by the Union of Kenya Civil Servants (UKCS), UKCS represents employees in the Public Service of the Government commonly known as Public Servants and whose remuneration is derived directly from the Consolidated Fund of the Government of Kenya”.

22. The Board further observed that under the provisions of Articles 36 and 41 of the 2010 Constitution, membership of UKCS is open to all Civil Servants and its Constitution does not bar any public servant from joining it. The Public Servants Union would therefore be a parallel union to the UKCS which is not good for “Industrial harmony”.

23. The Appellants seek to register a Union for Public Servants and the Blacks Law Dictionary defines Public Servants as follows:-

“ Someone who works for the government, especially one elected to a government post”

24. The online dictionary defines Public Servants as:-

“a person who work for the State or for Local Government such as a Judge or a teacher”.

25. My understanding of this definition is that Public Servants are Servants of the Public whose remuneration emanates from the consolidated fund. This will include teachers, government doctors, judges, civil servants etc.

26. Indeed the Union envisaged by the appellants in my view covers a very wide scope even consuming all other Unions that exist in the Public Sector. There are many other Unions that are already covering the various specific Sectors including the USCK.

27. The right to registration of a trade union and in any case, any labour rights are not absolute and Article 24 of the Constitution of Kenya 2010 limits labour rights and rights listed there to the extent reasonable and justifiable in an open and democratic society based on a number of factors including the nature of the right or fundamental freedom, importance and purpose of the limitation, the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedom of others etc.

28. The argument by the Appellants that their right of Freedom of Association under the Constitution will therefore be considered in relation to other rights and whether the invitation is reasonable and justifiable in our society.

29. The Appellants propose to register a union which in my view is amorphous and without proper boundaries, the proposed union will indeed swallow all other union in the public sector thus bringing confusion in Industry.

30. Without delving into any other reasons for refusing to register this union by the Registrar of Trade Union, I find that the decision of the Registrar of Trade Union was valid and this appeal has no merit. I dismiss this appeal accordingly with costs to the Respondents.

Dated and delivered in open Court this 29th day of January, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kioko for Respondent – Present

Migele holding brief Enonda for Appellants – Present