



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

APPEAL NO. 9 OF 2018

HEZBON LUMUMBA M'MBOLO.....1ST APPELLANT

JESCAH MUKUNGU KAVULIKA.....2ND APPELLANT

JAIRUS KATERE SHIAMALA.....3RD APPELLANT

DEBORAH OGAGE.....4TH APPELLANT

CAROLYNE MUKWANA WANYAMA.....5TH APPELLANT

(All suing on behalf of the proposed Kenya Union of Special and Professional Guards)

- VERSUS -

REGISTRAR OF TRADE UNIONS.....RESPONDENT

- AND -

KENYA NATIONAL PRIVATE

SECURITY WORKERS UNION.....1ST INTERESTED PARTY

COTU.....2ND INTERESTED PARTY

PRIVATE SECURITY REGULATORY AUTHORITY....3RD INTERESTED PARTY

KENYA PRIVATE UNIVERSITY WORKERS UNION...4TH INTERESTED PARTY

(Before Hon. Justice Byram Ongaya on Friday 22nd March, 2019)

JUDGMENT

The 1st and 2nd appellants applied to the respondent by the letter dated 07.05.2018 for a certificate to recruit members for purposes of establishing a trade union to be known as Kenya Union of Special and Professional Guards – KUSPROG. The letter stated that the issuance of the certificate of recruitment would enable the promoters to recruit, establish, and eventually make a formal application for registration of the proposed union pursuant to the provisions of the Labour Relations Act, 2007 and ILO Convention Nos.87 and 98 and, Articles 36 and 41 of the Constitution of Kenya, 2010.

The respondent replied by the letter dated 24.05.2018 stating that she wished to inform the 1st and 2nd appellants that security guards are already represented by the existing union of Kenya National Private Security Workers Union (KNPSWU). The letter further stated that according to the constitution of KNPSWU, membership includes employees employed in any private security service providers, private security firms, courier firms ran and managed by private security service providers and firms, as well as private security officers, private investigators, security guards, wardens, rangers, VIP guards, bouncers, cash escorts and cash management. The letter stated that the security guards are already represented and from the promoters' application, the proposed union was seeking to cover the same scope as already covered. The letter further stated that under the Labour Relations Act it is provided that a proposed trade union would only engage on recruitment for the sectors where no other trade union exists so that recruitment by another union with almost identical scope of coverage is therefore statutory barred. Thus, the letter conveyed that in view of the statutory provisions, the application failed.

The appellants being dissatisfied with the respondent's decision filed a memorandum of appeal on 21.07.2018 based on the grounds to the following effect:

- 1) The respondent erred in law and fact when she refused to issue the appellants with a promoter's certificate for recruitment of members for establishing the proposed union.
- 2) The respondent's decision to decline the issuance of the certificate upon the ground that the security guards were already represented by the existing Kenya National Private Security Workers Union (KNPSWU) and that the constitution for KNPSWU covered the same scope as the proposed union were reasons not within the provisions of section 12 of the Labour Relations Act, 2007.
- 3) The respondent erred in declining to issue the promoters certificate of recruitment on grounds other than those provided for in law in the sense that an application under section 12 of the Act should be declined if the application is incurably defective. Secondly if the proposed union name already exists or is so similar to an existing union as to cause confusion. In her letter dated 24th May 2018, the respondent did not raise any of those grounds as the reasons for declining the issuance of the promoters' certificate of recruitment. Hence the respondent's decision was non compliant with section 12 of the Act.
- 4) The registrar erred by denying the appellants the certificate as was applied for because technically and procedurally the applicants for such a certificate cannot be able to fulfil the requirements of sections 13, 14, 18, 19 and 20 of the Labour Relations Act, 2007 without the promoters certificate of recruitment under section 12 of the Act. Thus the registrar's letter of 24.05.2018 was unlawful.
- 5) Section 12 of the Act is mandatory and is designed to properly regulate the respondent's discretion in exercise of statutory duty. The respondent acted without jurisdiction by failing to look into the provisions of section 12(2) (a) (b) (c), and 3(a) (b).
- 6) As a consequence the respondent has fundamentally and substantively violated the rights of the appellants to exercise their rights as provided under Articles 36 and 41 of the Constitution of Kenya and breached the provisions of sections 4 and 12 of the Labour Relations Act, 2007 and similarly has acted in breach of statutory mandate conferred upon her office to discharge fairly, reasonably and not whimsically, capriciously, frivolously, and callously.
- 7) The errors made by the respondent to camouflage under the guise of existence of another trade union is self-defeatist as the same is not a ground set by section 12 of the Act, and was meant to breach the rights of the appellants or promoters to establish a trade union as provided under section 12 of the Act and Article 41 of the Constitution, the right and freedom of association as provided under Article 36 of the Constitution, and the right to enjoy a fair administrative action as provided under Article 47 of the Constitution.
- 8) The appellants or promoters of the proposed trade union have complied with requirements in section 12 of the Act.

The appellants prayed for orders:

- a) A declaration that the respondent (Registrar of Trade Unions) failed in her statutory duty when she communicated her decision vide letter dated 24.05.2018, 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, the letter dated 24.05.2018 is invalid, null and void **ab initio**.
- b) A declaration that the fundamental rights and freedom of association of the appellants were substantively breached by the respondent's (Registrar of Trade Unions') refusal to issue the Certificate of Recruitment sought in a letter dated 07.05.2007.
- c) An order of injunction to compel 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 07.05.2018.
- d) In alternative, a permanent order of injunction be issued against the respondent compelling the respondent (Registrar of Trade Unions) to register the proposed Kenya Union of Special and Professional Guards (KUSPROG) in terms of provisions of section 19 and: (a) issue a certificate of registration in Form B set out in the second schedule; and (b) enter the name and details of the trade union, in the appropriate register in Form C set out in the second Schedule as all factors considered for registration have since been conclusively determined (as added in the amended memorandum of appeal dated and filed on 04.12.2018).
- e) Any other relief that the Honourable Court may deem fit to grant.
- f) Costs of the appeal be borne by the respondent.

The supporting affidavit of the 1st appellant was annexed on the memorandum of appeal.

The respondent filed on 08.10.2018 her replying affidavit through Charles Mutinda, Deputy Chief State Counsel, for Hon. Attorney General. The interested parties were enjoined and the parties filed their respective submissions.

The Court has considered the material on record including the parties' respective submissions and considers that the **main issue in dispute** is whether the respondent in denying the appellants a certificate for recruitment of members for purposes of forming a trade union acted in accordance with the applicable provisions of section 12 of the Labour Relations Act, 2007. Section 12(3) of the Act provides that the registrar shall issue a certificate within thirty days of receiving an application unless:

a) the application is defective, or

b) the name of the proposed trade union or employers' organisation is the same as that of an existing trade union or employers' organisation or is sufficiently similar so as to mislead or cause confusion.

The appellants' case is that in declining to grant them a certificate under section 12 of the Act, the respondent did not invoke any of the grounds prescribed in section 12 (3) but acted unreasonably by invoking a ground that was not contemplated, namely, that the appellant's proposed union would recruit members that were sufficiently represented by the Kenya National Private Security Workers Union (KNPSWU). The respondent replies that in Charles Salano & 9 Others (Proposers & Promoters of Kenya Supermakets Workers Union (KESMWU) – Versus- Registrar of Trade Unions and Another [2017]eKLR, the Court of Appeal held thus, "**Accordingly, for a proper interpretation of Section 12, 13, and 14 of the Act to be arrived at, the said provisions ought to be read conjunctively. We say so as any party desirous of registering a trade union cannot comply with either of the said provisions in isolation.**" The Court follows that holding as it is bound accordingly. The Court's further opinion is that the three cited sections are conjunctively considered at the point of registering a trade union and not at every stage of the process which commences with the promoters of a proposed trade union applying for a certificate to recruit as provided for under section 12 of the Act. The Court returns that at that initial stage the registrar is bound to only consider the mandatory criteria in section 12 (3) in granting or declining the prescribed certificate for recruitment of members – because at that stage, it is not an application for registration of the union but an initial certificate to facilitate the recruitment and then thereafter, the application for registration will follow in six months. Thus, section 13 of the Act provides that a trade union or employers' organisation shall apply to the registrar for registration within six months of receiving a certificate issued under section 12.

In the instant case the Court has Considered the mandatory criteria in section 12 (3) of the Act and the Court returns that indeed the appellants have shown that they had complied. First, the respondent has not shown that name of the proposed trade union is the same as that of an existing trade union or employers' organisation or is sufficiently similar so as to mislead or cause confusion. Second, the respondent has not shown that the application was defective. The Court has considered the meaning of the application being defective and returns that the application would be defective only if it is not compliant with the formalities in subsection 12 (2) of the Act. The subsection provides that an application for the certificate referred to in subsection (1) shall be signed by two persons who are promoting the establishment of the trade union or employers' organisation; specifying the name of the proposed trade union or employers' organisation; and contain any other prescribed information. The appellants have shown that they complied accordingly and there is no material on record to show that their application failed to contain any other prescribed information (as no such prescribed information was mentioned in the present case).

The Court further returns that it is after making an application under section 13 that consideration can be made whether the application for registration meets the tests and conditions in section 14. The Court returns that such consideration must embrace a factual approach including consideration of the recruited persons following the grant of the certificate in section 12 and the consideration for registration cannot be based on mere speculation or unfounded anticipation and apprehension that the proposed union subject of an application in section 12 of the Act will cover the same sector as an existing union and such decision made unilaterally by the respondent in purported exercise of statutory discretion. Indeed it is not enough that on the face of it the proposed union would cover a membership in a sector for which a union is already registered but that under the law, such already registered union would have to raise an objection in the subsequent steps of considering the application for registration. The Court returns that the Act clearly imposes a judicious process that embraces a factual approach rather than the respondent's exercise of a discretion based only on her opinion.

Thus, it is the Court's opinion that once promoters meet the criteria in subsection 12 (3) of the Act the respondent is bound to issue the certificate to recruit as prescribed and thereby pave way for a judicious consideration of the application for registration if the application is subsequently made as prescribed in the Act. The Court has considered section 14 of the Act on the elaborate requirements for registering a trade union and returns that it is unfair and *ultra vires* for the registrar to deny a certificate for recruitment of members as envisaged in section 12 of the Act on a purported summary finding without necessary material facts to decline the certificate upon consideration of the matters in section 14 and as appears to have been the case in the present appeal where one requirement that may lead to denial of registration was apprehensively relied upon by the respondent to decline the certificate under section 12 as had been applied for. The Court finds that the decision by the respondent to decline the certificate under section 12 of the Act as was applied for to have been unreasonable and as submitted for the appellants, because, the respondent failed to take into account the correct criteria as provided for in subsections 12(2) and (3) of the Act. Accordingly, the appellants have established that their constitutional rights as provided for in Articles 36, 41 and 47 of the Constitution were thereby curtailed and therefore violated.

The Court of Appeal has held in Charles Salano & 9 Others (Proposers & Promoters of Kenya Supermakets Workers Union (KESMWU) – Versus- Registrar of Trade Unions and Another [2017]eKLR, that the limitation of the rights in Article 36 and 41 of the Constitution is reasonable and justifiable in an open and democratic society. Again, the Court follows the holding of the Court of Appeal in Kenya Plantation and Agricultural Workers Union –Versus- David Benedict Omulama and 9 Others, Civil Appeal No. 141 of 2014 that section 14(1) (d) (i) of the Labour Relations Act, 2007 is sufficient statutory provision limiting the right to form or join a trade union and that provision is not an unconstitutional limitation to form and join a trade union. However, in the instant case the appellants were at the initial stage of applying for a certificate to recruit members under section 12 of the Act and the stage for the application of section 14 in the process had not accrued – section 14 provision had been invoked prematurely. The Court returns that it would therefore be premature or irrelevant to invoke limitation of the appellants' rights within the holdings of the Court of Appeal in the cited cases.

Finally, in considering the reason for denial of the certificate under section 12 of the Act, the Court returns that in an appropriate case, section 14 of the Act is clear that the registrar may register a trade union (even if a sector trade union is already registered) consisting of persons working in more than one sector if the registrar is satisfied that the constitution of the trade union contains suitable provisions to protect and promote the respective sector's interests of the employees. Thus, existence of an already registered union in a sector an applicant under section 12 of the Act would not, in the opinion of the Court, constitute a valid and conclusive reason for denying the certificate as applied for. The Court returns that the appropriateness or lack of it to register the proposed union would have to be evaluated judiciously and in view of the provisions in section 14 of the Act and other relevant and lawful considerations if an application to register the proposed union is subsequently made.

The Court has considered the position and submissions for interested parties and returns that their respective concerns as relates to their role

in the sector the proposed union seeks to operate would be best and primarily considered by the respondent and the National Labour Board under the Act should the appellants eventually seek registration of the proposed union. Accordingly, the Court will not delve into the interested parties' positions so as not to prejudice the proper statutory role of the respondent and the Board in that regard.

The appellants prayed that they had satisfied the requirements for registration and therefore the Court should order the registration of the proposed trade union under section 19 of the Act. Clearly that would amount to the Court improperly usurping the clear registration process by involved authorities under the Act as vested in the registrar and the Board. The Court reckons that the appeal was against denial of a certificate to recruit members of the proposed trade union under section 12 of the Act and not denial of registration under section 19 of the Act. Accordingly, the appellants' prayer in that regard was misconceived and would be declined.

The Court returns that the respondent will pay the appellants' costs of the appeal and the interested parties shall bear their own costs of the case.

In conclusion judgment is hereby entered for the appellants against the respondent for:

- a) The declaration that the respondent (Registrar of Trade Unions) failed in her statutory duty when she communicated her decision vide letter dated 24.05.2018, 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 24.05.2018 is invalid, null and void *ab initio*.
- b) The declaration that the fundamental rights and freedom of association of the appellants were substantively breached by the respondent's (Registrar of Trade Unions') refusal to issue the Certificate of Recruitment sought in a letter dated 07.05.2018.
- c) 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 07.05.2018 and not later than 30 days from the date of this judgment.
- d) The respondent to pay the appellants' costs of the appeal and other parties to bear own costs of the proceedings.

Signed, dated and delivered in court at **Nairobi** this **Friday 22nd March, 2019**.

BYRAM ONGAYA

JUDGE