



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

APPEAL NO. 18 OF 2019

CHARLES A.J OSICHO.....1ST APPELLANT

PETER NGUMA MATHEKA.....2ND APPELLANT

JOSEPH ODIMO.....3RD APPELLANT

GEORGE MAKAU.....4TH APPELLANT

STEPHEN KEKE.....5TH APPELLANT

PAUL OKETCH NYASUGA.....6TH APPELLANT

TONY OMONDI.....7TH APPELLANT

(ALL SUING ON BEHALF OF THE PROPOSED

KENYA UNION OF ROAD COSTRUCTION

AND CIVIL ENGINEERING WORKERS)

-VERSUS-

REGISTRAR OF TRADE UNIONS.....RESPONDENT

AND

KENYA BUILDING CONSTRUCTION TIMBER

AND FURNITURE INDUSTRIES EMPLOYEES UNION.....INTERESTED PARTY

(Before Hon. Justice Byram Ongaya on Friday 8th November, 2019)

JUDGMENT

The appellants filed an appeal on 12.06.2019 in person. The appeal is against the respondent's decision being refusal to register the proposed Kenya Union of Road Contractors and Civil Engineering Workers – KURCUCEW. The grounds of appeal are as follows:

a) The respondent erred in fact and law when she refused to register the proposed trade union as communicated in her letter Ref. No. ML&SP/R/172/24 dated 14.05.2019 and purportedly under section 14 (1) (d) of the Labour Relations Act, 2007.

b) The respondent erred in declining the registration on the grounds that the cadre of workers the proposed trade union seeks to represent are general workers in the construction industry and those working under consulting engineers and who are already represented by the existing registered union of Kenya Building Construction, Timber and Furniture Industries Employees Union (KBCTFEU) whose scope of representation includes workers in building and construction and civil engineering industry, general maintenance and timber and furniture manufacturing and woodwork activities.

c) The respondent erred in failing to appreciate that the existence of Kenya Building Construction, Timber and Furniture Industries Employees Union (KBCTFEU) that appears to represent or actually represents a portion of a cadre of workers in the sector is not on its own a limitation for formation and registration of another trade union under section 14 of the Labour Relations Act, 2007 and as a ground for refusal of registration of the proposed union, the respondent acted outside her statutory mandate.

d) The respondent erred because the sector the proposed union seeks to represent is not sufficiently represented by the Kenya Building Construction, Timber and Furniture Industries Employees Union (KBCTFEU).

e) The respondent in her refusal decision dated 14.05.2019 stated that while considering the appellants' application dated 12.03.2018, the National Labour Board reiterated that the Labour Relations Act allows the formation of trade unions on the basis of industry and sector and the respondent, in bad faith, failed to demonstrate how that averment from the Board related to her decision of refusing to register the appellants' proposed trade union.

f) The respondent erred in failing to appreciate the words "**sufficiently, whole and or substantive proportion**" in section 14(1) (d) of the Labour Relations Act, 2007. She instead unlawfully and of her own volition decided that a mere existence of another union which appears to represent a certain cadre of workers or states in its constitution that it will represent such cadre of workers is enough proof that it actually represents sufficiently the whole or a substantial proportion of the interests of such cadre of workers and the respondent acted **ultra vires** her statutory mandate.

g) The appellants have complied with section 14(1) (d) of the Labour Relations Act, 2007 upon which the respondent purports to rely upon to deny the appellants the registration of the proposed trade union. In particular since 1952, the Kenya Building Construction, Timber and Furniture Industries Employees Union (KBCTFEU) as of 2018 represents only 38, 000 employees being only 26 % of the cadre of 145,000 workers in the sector. The 26% falls short of sufficiency in view of simple majority that is required of a union to enjoy recognition by the employer. Further the Kenya Building Construction, Timber and Furniture Industries Employees Union (KBCTFEU) has not entered recognition agreements with key employers in the sector such as Road and Civil Engineering Contractors Association (RECECA); Consulting Engineers; Surveyors Association; Architects Association. The proposed trade union has recruited the workers in such unrepresented cadres.

h) Articles 41(2) (c) and 36 of the Constitution entitle the appellants to seek registration of the proposed trade union because the existing trade union does not sufficiently represent the whole or substantial proportion of the cadre of workers the proposed union seeks to represent.

The appellants prayed for:

1) A declaration that the respondent's, the Registrar of Trade Unions, refusal to register the appellants' proposed trade union is bad in law and that her letter dated 14.05.2019 together with the notification for refusal of registration attached therewith are both invalid, null and void **ab initio**.

2) A declaration that the fundamental right and freedom of association of the appellants were substantially breached by the respondent's refusal to register the appellants' proposed trade union, The Kenya Union of Road Contractors and Civil Engineering Workers (KURCACEW) as sought in the letter dated 12.03.2018.

3) A permanent injunction against the respondent, compelling the respondent to register the appellants' proposed trade union The Kenya Union of Road Contractors and Civil Engineering Workers (KURCACEW) in terms of the provisions of section 14, 18, and 19 of the Labour Relations Act, 2007 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 as set out in the second schedule;

as all factors considered for registration have since been conjunctively determined herein.

4) Issue any other reliefs or orders that the Honourable Court may deem fit to grant for ends of justice to materialise.

5) Respondent to pay costs of the appeal.

The memorandum of appeal was supported with the verifying affidavit of Charles A.J. Osicho and the attached exhibits.

The Registrar of Trade Unions E.N. Gicheha opposed the appeal by filing her replying affidavit sworn on 25.09.2019. He position is as follows:

a) The appellants' application to register the proposed trade union underwent all the legal procedure under the Labour Relations Act, 2007.

b) As per section 31(3) of the Labour Institutions Act the respondent sought the advice of the National Labour Board on the registration of the proposed trade union and the Board considered the matter at the meeting held on 10th and 11th May 2019. The Board advised against registration of the proposed trade union. By the letter dated 14.05.2019 the respondent communicated the decision of refusal to register the proposed trade union.

c) Under section 14(1) (d) of the Labour Relations Act a trade union may apply for registration if no other trade union already registered is sufficiently representative of the whole or substantial proportion of the interest in respect of which the intended trade union seeks representation.

d) The appellants sought to represent Road and Civil Engineering Workers; Technical designs and construction for public workers; consulting engineering, architectural design and surveying works; dam, pipeline, airport or airstrip construction including maintenance. The areas are sufficiently represented by the interested party herein.

e) The respondent properly acted within her discretion to refuse registration of the proposed trade union.

The Court has considered the parties' respective submissions and the material on record and makes a finding as follows:

1) There is no dispute that in allowing or declining registration of a trade union the respondent applies the test in section 14 (1) (d) of the Labour Relations Act, 2007.

2) There is no dispute that the interested party was registered over 50 years ago and its sector of representation of workers overlaps the one the proposed trade union seeks to represent.

3) The issue in dispute is whether the interested party is sufficiently representative of the whole or substantial proportion of the interest in respect of which the intended trade union seeks representation. The material on record show that it has recruited and represented only 38, 000 workers out of a potential of 145, 000 workers. By that evidence the appellants have demonstrated that indeed the interested party represents only 26% of the available employees and which by section 54 of the Labour Relations Act, 2007 leaves out 74% of the workers which when recruited would easily justify recognition of another union in the sector. Further, the appellants say they seek to recruit in the cadres of workers with key employers in the sector such as Road and Civil Engineering Contractors Association (RECECA); Consulting Engineers; Surveyors Association; and Architects Association and in which the interested party has no recognition agreement. The interested party has not laid before the respondent or this Court material to disturb the appellants' case that the interested party has not recruited and concluded a recognition agreement with those key employers in the sector. Taking that evidence into account, the Court returns that the appellants have established that the interested party while registered to represent employees in the sector the appellants wish to represent, the interested party is not sufficiently representative of the whole or substantial proportion of the interest in respect of which the proposed trade union seeks representation. Accordingly, the Court returns that the appellants have established their case and are entitled to the remedies as claimed, urged and prayed for.

4) The appellants have succeeded and they are entitled to the costs of the appeal.

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

1) The declaration that the refusal by the respondent (the Registrar of Trade Unions) to register the appellants' proposed trade union was bad in law and that the letter dated 14.05.2019 together with the notification for refusal of registration attached therewith are both invalid, null and void *ab initio*.

2) The declaration that the fundamental right and freedom of association of the appellants were substantially breached by the respondent's refusal to register the appellants' proposed trade union, The Kenya Union of Road Contractors and Civil Engineering Workers (KURCACEW) as sought in the letter dated 12.03.2018.

3) The order compelling the respondent to register the appellants' proposed trade union, The Kenya Union of Road Contractors and Civil Engineering Workers (KURCACEW) in terms of the provisions of section 14, 18, and 19 of the Labour Relations Act, 2007 and to:

c) issue a certificate of registration in Form B set out in the second schedule; and

d) enter the name and details of the trade union in the appropriate register in Form C as set out in the second schedule;

as all factors considered for registration have since been conjunctively determined herein.

4) The respondent to pay the appellants' costs of the appeal.

Signed, dated and delivered in court at Nairobi this Friday, 8th November, 2019.

BYRAM ONGAYA

JUDGE