



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**APPEAL NO. 3 OF 2017**

**(Before Hon. Justice Hellen S. Wasilwa on 22<sup>nd</sup> March, 2018)**

**JOEL MBUTHIA ..... 1<sup>ST</sup> APPELLANT**

**SAMSON O. ONGERA .....2<sup>ND</sup> APPELLANT**

**STEVE O. HANGALA .....3<sup>RD</sup> APPELLANT**

**-VERSUS-**

**THE REGISTRAR OF TRADE UNIONS.....RESPONDENT**

**AND**

**KENYA UNION OF COMMERCIAL FOOD AND ALLIED**

**WORKERS .....INTERESTED PARTY**

**RULING**

1. The interested Party, Kenya Union of Commercial Food and Allied Workers, filed a Preliminary Objection dated 31.10.17 raising the grounds that:

**1. The Appeal is Res Judicata**

**2. The Appeal is filed contrary to section 7 of the civil procedure Act, 2010, and therefore the Honourable Court lacks jurisdiction to grant the orders prayed for.**

**3. In any case, the Appeal is bad in law, vexatious an abuse of this Honourable Court's process.**

**Submissions**

2. It is submitted that the Appellant has mainly challenged the registrar's decision of failing to register the application as contained in Form A of the proposed Trade Union (National Union of shops-Retailers and General Merchants Workers) dated 7.7.2015.

3. That the Court heard and determined a number of matters being litigated by promoters of yet to be registered unions with a unanimous finding that:

**a. Whereas no union can claim monopoly over workers representation, for the sake of Order and harmony in industrial relations, duplicity in representation should be avoided.**

**b. The registrar reasonably exercised her discretion in refusing to issue the appellants with a certificate because she was persuaded the interested party already sufficiently represented the interest of the workers sought to be represented by the Appellant.**

4. Counsel urges that the Court is functus officio on the hearing and determination of an appeal from the Registrar of Trade Unions on account of promoters championing for the registration of another union to rival the interested party in the supermarkets, shops, retail and wholesale outlets, distribution and supply companies. That the Court can only interfere with the same in a review of the judgments and

rulings made thereto which is not the case.

5. He further submits that the Appellants have mounted this appeal which has been admitted that at some point the Court dismissed ELRC Appeal 3 of 2014 for want of form. The subsequent issues raised in Appeal no. 18 of 2014 which was litigated to the Court of Appeal where similar issues were raised thus amounting to res judicata. They pray for the Preliminary Objection to be upheld.

6. The Appellant submit that the Preliminary Objection suffers from lack of evidence, focus and particularity, the same is incompetent and without merit as the same is irrelevant to the Appellant's memorandum of appeal dated 10.3.2017, which Appeal is challenging the decision of the Respondent (Registrar of Trade Unions) as contained in Form D and dated 20.4.2016. That the Interested Party's Notice of Preliminary Objection is premised on the wrong law, Section 7 of the Civil Procedure Act, 2010 and should be struck out.

7. That for a Notice of Preliminary Objection to prevail, it must strictly satisfy the point of law through which it has been brought, and matters, or/and facts in the suit before Court must be agreed by all parties to the suit. If the same is disputed to the extent that the Court is invited to interrogate then the Preliminary Objection must fail. The promoter cites the case of **P.M.N. vs. Kenyatta National Hospital & 6 Others (2015)eKLR.**

8. On the law of Res judicata, it is submitted that the Appeal dated 10.3.2017, is properly brought before the Court under section 30 of the Labour Relations Act, 2007. That nothing renders the Court powerless to hear and determine the appeal herein. That the appeal raises triable issues and is not identical or related to any other appeal, claim or suit which had been filed, litigated and conclusively determined before this Honourable Court. He cites the case of **John Florence Maritime Services Limited & Another vs. Cabinet Secretary for Transport and infrastructure & 3 Others (2015) eKLR** in support of this position.

9. The Appellants state that the Preliminary Objection is not merited and the same should be dismissed with costs.

10. I have considered the submissions of both parties. I do find that the issues being raised by the Interested Party do not fall into the category of what is in essence a Preliminary Objection as they raise factual issues which cannot be determined as a Preliminary Objection.

11. For this Court to determine this application the Court will have to consider factual issues and this goes beyond matters of law. I therefore find the preliminary objection has no merit and I dismiss it accordingly. The Appeal will proceed for determination on its own merit.

12. Costs in the cause.

Read in open Court this 22<sup>nd</sup> day of March, 2018.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

No appearance for Parties