



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF

KENYA AT NAIROBI

APPEAL NO 27 OF 2016

CHARLES OGUTU.....1ST APPELLANT

STANLEY KIPTOO MOOTIAN.....2ND APPELLANT

ABRAHAM KOVA.....3RD APPELLANT

VERSUS

THE REGISTRAR OF TRADE UNIONS....RESPONDENT

JUDGMENT

1. This was an appeal against the decision of the Registrar of Trade Unions made on 21st May 2016 rejecting the issuance of certificate for establishment of a Trade Union to be known as Kenya Union of Cane and Allied Workers.

2. The appeal was brought on the grounds among others that:

*1. That the Registrar misdirected herself in law and fact in rejecting the Appellants' application for the registration of a Trade Union under **Section 12(3) of the Labour Relations Act** which bound her in mandatory terms to issue the requisite certificate within **"THIRTY DAYS OF RECEIVING THE APPLICATION"** unless where the application is defective (S.12(3))(a); and where the name of the proposed Trade Union is the same as that of an existing one or sufficiently similar so as to mislead or cause confusion (S.12(3)(b)).*

2. That Registrar of Trade Unions misdirected herself in law and fact in failing to find and hold that the Trade Union known as Kenya Union of Sugar Plantation and Allied Workers which she suggested represents the Applicant's interests did not have any interest in the Appellants and their colleagues since 2011 when the Appellant's company was established.

3. That the Registrar of Trade Union misdirected herself in law and in fact when she failed to hold and find that employees of Transmara Sugar Company Limited already enjoyed salary increment of at least 10% - 15% per year, whereas the Kenya Union of Sugar Plantation and Allied Workers had signed a Collective Bargaining Agreement for only 5% - 8% salary increase per year and could therefore not adequately represent the rights of the Appellants and their colleagues in this case.

4. That the Registrar of Trade Union misdirected herself in law and in fact when she failed to hold and find that the Kenya Union of Sugar Plantation and Allied Workers is moribund and engulfed in leadership squabbles and therefore, did not have a future to represent our rights as workers.

5. That the Registrar of Trade Union misdirected herself in law and in fact when she failed to hold and find that in the absence of absence of a Union representing the rights of Transmara Sugar Workers had seen the Human Resources Department Transmara Sugar Co. workers had seen the Human Resources Department Transmara Sugar Co. Limited engage in blatant abuse of workers' rights.

3. The appeal was further supported by the affidavit of one Charles Ogutu who deponed on the main that:

a. That I am employed at Transmara sugar Company Limited as Senior Payables Accountant.

b. That my co-workers and myself have been desirous of forming our own Trade Union as guaranteed under Article 41 (1) and (2) (c) of the Constitution and as more specifically spelt out in Section 4(1) (a), (b) and (c) of the Labour Relations Act (Cap 233) and

consequently instructed the firm of Wabuyabo Lukoba and Co Advocates to pursue that course.

c. That pursuant to our instruction firm of Wabuyabo Lukoba & Co Advocates made the requisite application for certificate for establishment of a Trade Union under Section 12 of the Labour Relations Act aforesaid on 22nd April, 2016 which application was duly lodged with the registrar of Trade Unions on 25th april, 2016.

d. That on 28th April, 2016, the Registrar of Trade Unions wrote to the firm of Wabuyabo Lukoba & Co Advocates seeking to know the intended coverage of the proposed union.

e. That on 9th May, 2016 we instructed the firm of Wabuyabo Lukoba & Co Advocates the scope of coverage of the proposed union vide our letter of that date.

f. That the firm of Wabuyabo Lukoba & Co Advocates communicated our instructions to the Registrar of Trade Unions vide their letter dated 9th May, 2016 which was duly received at the Office of the Registrar of Trade on 10th May, 2016.

g. That it was not until 31st May, 2016 that the Registrar of Trade Unions wrote back to the firm of Wabuyabo Lukoba & Co Advocates stating that the application which had been made for certificate for establishment of a Trade Union under Section 12 of the Labour Relations Act failed.

h. That in her letter of rejection, the Registrar of Trade Unions stated as follows:

In reference to the above matter and further to your letter dated 9th May, 2016 I wish to inform you that employees working in the Sugar Industries, are already represented by the Kenya Union of Sugar Plantation and Allied Workers.

According to the constitution of the union, membership is open to all employees in the sugar or allied industry.

The Labour Relations Act provides, that a proposed trade union would engage on recruitment for the sector(s) where no other union exists. Consequently, recruitment by a proposed trade union where another trade union already exists is statutory bared. Arising from the foregoing, I therefore regret to inform you that this application fails.

4. The respondent opposed the appeal and in response filed a replying affidavit through the registrar herself. She deponed on the main that:

a. That the applicants lodged their application for certificate of recruitment with the respondent on 25th April, 2016 through their Advocate on record Wabuyabo Lukoba & Co Advocates for a proposed Trade Union Known as Kenya Union of Cane and Allied workers.

b. That the respondent vide a letter dated 28th April, 2016 requested to know the envisaged scope of representation by the applicants.

c. That the respondent responded vide a letter dated 31st May, 2016 informing the applicants through their advocates that their application for certificate of recruitment had failed on grounds that the intended scope of representation was already covered by the Union of Kenya Union of Sugar Plantations and Allied workers Union.

d. That the respondent's mandate is the registration and regulation of Trade Unions, Employers Organizations or Federations.

e. That in performing her official duties, the respondent is guided by the Constitution of Kenya, the Labour Relations Act 2007 and Labour Institutions Act.

f. That the respondent is barred by the provisions of Section 14 of the Labour Relations Act from registering a Trade Union where there is already an existing Trade Unions(s) representing the interest of the employees, the proposed union intends to recruit.

g..That according to the constitution of the Kenya Union of Sugar Plantation and Allied Workers, membership is drawn from all employees engaged in the sugar or allied industries. In addition, one of the objects of the Union is to organize all employees in the sugar industry, assist its members through a collective bargaining system, obtain fair remuneration for their labour, establish and maintain satisfactory condition of employment for employees in the industry.

h. That arising from the foregoing, the registered union represents all employees in the sugar industry regardless of specific sugar companies.

i. That the issuance of a Recruitment Certificate and thereafter register the proposed union in a sector which is already represented is wrong as this would lead to encroachment on recruitment upon the turf of registered and established trade unions, thus confusing employers, workers and the proposers of the proposed union alike.

j. That the respondent avers the intention of the legislature in enacting the Labour Relations Act is that a proposed Trade Union would engage on recruitment for those sectors where no other exists, and therefore, it would be legally wrong to issue a certificate leading to registration of a trade union where another trade union already exists.

5. In his submissions in support of the appeal, Mr Wabuyabo for the appellant submitted among others that every worker had a right to form, join or participate in activities and programmes of a trade union. This right was guaranteed under chapter four of the constitution and could not be limited by any individual.
6. Counsel further submitted that section 12(3) places an obligation on the Registrar of Trade Union to issue a certificate of recruitment within 30 days of an application being made in that behalf. The section according to counsel was mandatory and the Registrar did not have a discretion in the matter except where the application is defective and where the name of the proposed Trade Union is the same as an existing one or sufficiently similar so as to mislead or cause confusion.
7. According to Mr Wabuyabo, the application was made to the Registrar on 22nd April, 2016 and was received on 25th April, 2016. The Registrar was bound to issue the requisite certificate by 24th May 2016 unless the application was defective or the name of the proposed trade union was same as an existing one or sufficiently similar so as to mislead or cause confusion. Counsel submitted that the Registrar did not reject the application based on the reason cited in law but on her own man made reasons.
8. According to counsel, the appellants and their colleagues have clearly demonstrated that they were in need of forming their own trade union and that the Kenya Union of Sugar Plantation and Allied Workers which the Registrar suggested could address the interest of the appellants failed to protect them.
9. Counsel further submitted that there was credible information that Kenya Union of Sugar Plantation and allied Workers was moribund and engulfed in leadership squabbles and therefore did not have a future to represent. The appellants and their colleagues' rights as workers.
10. Mr Kioko for the respondent submitted that section 31(3) of the Labour Institutions Act provided that the Registrar of Trade Unions shall exercise her powers in relation to the registration and regulations of Trade Unions in accordance with the law. The law was that registration may be refused if any particular sector is already represented elsewhere as demonstrated. According to counsel provisions of section 14(1) of the Labour Relations Act limits the powers of the respondent to register a trade union in circumstances where there is in existence another trade union which is sufficiently representative of the whole or substantial proportion of the interest in respect of which the appellants sought to be issued with a certificate of recruitment.
11. According to Mr Kioko the issuance of recruitment certificate to the appellants proposed union would be tantamount to encouraging encroachment upon the turf of registered and established Trade Unions where the workers are catered for. The right to form and or join a trade union of one's choice is protected by the Constitution and International Labour Organization convention 98 on the right organization.
12. Under Article 24 of the Constitution rights and fundamental freedoms in the Bill of Rights shall not be limited except by law and justifiable in an open and democratic society. What this means is that except for the those rights under article 25 of the Constitution which are freedom from torture and cruel, inhuman or degrading treatment, freedom from slavery or servitude, right to a fair trial and the right to an order of *habeas corpus*, other rights and fundamental freedoms can be limited provided such limitation is justifiable in an open and democratic society.
13. The right to form and join a trade union is subject to parameters set out in the Labour Relations Act. At the promotion stage, before giving the interim certificate of registration to enable the promoters of the intended union recruit members, the Registrar is required to ensure that the application is not defective and further that the name of the reposed union is not the same as an existing one or sufficiently similar so as to mislead or cause confusion.
14. The appellants herein intend to register a union by the name Kenya Union of Cane and Allied Workers. The Registrar in refusing the application for interim certificate informed the appellants that employees working in sugar industries were already represented by the Kenya Union of Sugar Plantation and Allied Workers. According to the Unions constitution membership was open to all employees in the sugar or allied industry.
15. Section 12 requires among others that the name of the proposed union should not be the same as that of an existing one or sufficiently similar so as to mislead or cause confusion. Sufficiency or similarity in the courts view is not limited to the name only but the intended scope of operations. The appellants herein do not deny that their intended membership would be drawn from workers in the sugar sector more specifically from Transmara Sugar Company. Their main complaint against the Kenya Union of Sugar Plantation and Allied workers was that the same neglected them and that it had become embroiled in internal wrangles and in effect became moribund.
16. The court is of the view that the intended union and Kenya Union of Sugar Plantation and allied Workers are 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 where there is already in existence a union sufficiently representative of the interests the appellants intended to represent. Weakness or challenges affecting an existing union cannot be reason to form another similar union the appellants have right to seek the intervention of the Registrar of Trade Union or ultimately the court in order to ensure the affairs of the union are conducted in a way that addresses fully the interests of its members.
17. In the circumstance, the court will uphold the decision the Registrar made on 31st May 2016 refusing to issue the appellants with a certificate of interim registration.
18. The appeal is therefore found without merit and is hereby dismissed with costs.
19. It is so ordered.

Dated at Nairobi this 2nd day of March 2018

Abuodha J. N.

Judge

Delivered at Nairobi this 2nd day of March 2018

Abuodha J. N.

Judge

In the presence of:-

..... for the Claimant

.....for the Respondent