



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

AT NAIROBI

APPEAL NO. 16 OF 2017

FRANK ESEVWE.....1ST APPELLANT
HENRY MWANGI.....2ND APPELLANT
MORRIS OWINO.....3RD APPELLANT
DANIEL ONSONGO.....4TH APPELLANT
TOBIAS O.AUKO.....5TH APPELLANT
CLEOPHEAS NYARIKI.....6TH APPELLANT
MIZPAH NDAMBUKI.....7TH APPELLANT

(Being Proposers and Promoters of

Universities Service Workers Union)

- VERSUS -

REGISTRAR OF TRADE UNIONS.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 13th April, 2018)

JUDGMENT

The appellants filed the memorandum of appeal on 21.11.2017 in person. The appellants prayed for judgment for orders:

- a) That the “**Notification of refusal of registration and the reasons thereof**” dated and delivered on the 30.10.2017 is unlawful and unconstitutional and thus null and void and hence is set aside forthwith.
- b) That the Registrar of Trade Unions is ordered to register the University Service Workers Union – USWU and issue a certificate of registration to the appellants forthwith.
- c) The costs of the appeal be borne by the respondent.

d) Any other or further and better relief that the Honourable Court may deem fit to grant be granted.

The appeal was based upon the verifying affidavit of Frank Esevwe filed on 21.11.2017 together with the attached exhibits.

The facts of the appeal are as follows. On 09.01.2017 the appellants wrote to the respondent pursuant to Article 41(2) of the Constitution of Kenya 2010 and sections 4 and 12 of the Labour Relations Act, 2007 applying for certificate for establishment of a proposed trade union to be known as Universities Service Worker Union with the physical address Upper Hill, Hillside Apartment, Ragat Road, P.O Box 11869 – 00100, Nairobi. The respondent issued a certificate on 25.04.2017 authorizing the appellants to undertake lawful activities in order to establish a trade union and to make an application for the registration of the trade union within six months from 25.04.2017. The respondent's letter dated 25.04.2017 forwarding the certificate conveyed that the appellants were to confine themselves to the three areas of recruitment namely drivers, artisans and custodians as indicated in their application letter (but perusal of the letter of application does not show such areas of recruitment). The appellants' case is that they confined the recruitment to the specified areas. By a notice in the Gazette being No. 7659 of 11.08.2017 and in the Star Newspaper of 14.08.2017, the respondent invited Kenya Union of Domestic, Hotels, Educational Institutions and Hospital Workers; and Kenya Universities Staff Union to submit in writing any such objections against the appellants' application and to do so within 21 days from the date of the invitation.

By the letter dated 30.10.2017, the respondent conveyed to the appellants that the National Labour Board at its meeting held on 17.10.2017 advised against the registration of the trade union as per the appellants' application. The respondent enclosed a notification of refusal of registration and the reasons thereof.

In the notification of refusal of registration dated 30.10.2017 the respondent stated that the grounds for the refusal were as follows:

- a) Universities service workers within the categories of artisans, drivers and custodians are sufficiently represented by the existing unions of Kenya Union of Domestic, Hotels, Educational Institutions and Hospital Workers (KUDHEIHA), Kenya Universities Staff Union (KUSU) and Kenya Private Universities Workers Union (KPUWU).
- b) According to the constitution of KUDHEIHA, membership, among others, is open to all non-teaching staff engaged in public universities at the level of Job Group I to IV and being the same group targeted by the proposed trade union.
- c) KUSU according to its constitution represents non-teaching employees and other allied workers employed or engaged by universities or their subsidiaries.
- d) KPUWU represents all workers, teaching, non-teaching and casuals in Kenya private universities.

The respondent stated that in view of the grounds and provisions of section 14 (1) (d) (i) of the Labour Relations Act, 2007, the law provides that a trade union may apply for registration if no other trade union already registered, is sufficiently representative of the whole or of a substantial proportion of the interests in respect of which the applicants seek registration. The respondent concluded that the university workers within the grades I to IV were therefore sufficiently represented by the mentioned existing trade unions.

The grounds of appeal are summed up as follows:

- a) The respondent having accepted the demarcation of the area of recruitment by the proposed trade union as per the letter dated 25.04.2017, she was not bound by the advice of the Board especially that the proposed trade union had adopted a constitution accordingly and as per section 14(1) (b) of the Labour Relations Act, 2007.
- b) The respondent erred in including the KPUWU in justifying her decision because KPUWU had

not been invited to make representations as per the Gazette and Newspaper invitations for representations.

c) The name of the proposed trade union was not similar or likely to cause confusion in view of the names of the existing trade unions.

d) The refusal by the respondent to issue a certificate of registration of the proposed trade union was misconceived and contravened Articles 24, 36, and 41 of the Constitution of Kenya.

The respondent opposed the appeal by filing the replying affidavit of E.N. Gicheha, the Registrar of Trade Unions; also being the respondent. The respondent admitted that the appellants applied to establish the proposed trade union; the application was indeed formally compliant; it was tabled before the National Labour Board for its statutory advisory function as per section 31 (3) of the Labour Institutions Act, 2007; the Board exercised its function and advised against registration of the proposed union; and the respondent exercised her statutory discretion by refusing to issue the certificate of registration of the proposed trade union. As per Article 259(11) of the Constitution of Kenya, 2010, the respondent acted upon the Board's advice and as per section 14(1) (d) of the Labour Relations Act, 2007 (which prevents registration of a trade union where there are already other registered trade unions covering the proposed area of representation). Further the appellants had not established denial of membership or effective representation by existing trade unions already operating and covering the area or sector the proposed trade union was to cover. Thus the respondent prayed that the appeal be dismissed with costs.

The parties filed submissions in line with the Court's directions.

Section 30 of the Labour Relations Act, 2007 provides that any person aggrieved by a decision of the Registrar (the respondent herein) made under the Act may appeal to the Employment and Labour Relations Court against that decision within 30 days of the decision. The respondent's decision of refusal of registration of the proposed trade union was issued on 30.10.2017 and the memorandum of appeal was filed within time on 21.11.2017.

The Court has considered the grounds of appeal. The appellants do not dispute the finding by the respondent that the proposed trade union desired to cover an area where there already existed trade unions sufficiently representative of the whole or of substantial proportion of the interests in respect of which the appellants applied for registration. In particular, the court returns that KUDHEIHA and KUSU clearly and substantially represented the interests of the employees the proposed union was to represent. Further, though KPUWU had not been included in the Gazette and Newspaper notices inviting representations, it is not disputed on the part of the appellants that KPUWU also covered the interests of the employees the proposed trade union was targeting. Thus the court returns that the appellants have failed to establish a factual error in the decision by the respondent and on that account alone, the appeal will fail. In view of that finding the Court will not delve into the other grounds of appeal because the same being issues of law, they lack a factual basis that may lead to setting aside the findings and decision by the respondent to refuse the registration of the proposed trade union.

While making that finding, 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.

In the instant case, the Court has considered the material on record and returns that the respondent objectively considered the provisions of the constitutions of the existing trade unions and correctly found that they were sufficiently representative of the whole or of substantial proportion of the interests in respect of which the appellants had applied for registration of the proposed trade union.

In conclusion, the appeal is hereby dismissed with orders that parties shall bear their own costs of the proceedings.

Signed, dated and delivered in court at Nairobi this Friday 13th April, 2018.

BYRAM ONGAYA

JUDGE