



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS

AT NAIROBI

APPEAL NO. 17 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 30th May, 2018)

KENYA UNION OF COURTIER AND ALLIED WORKERS REPRESENTED BY ITS PROMOTERS

LEONARD OMONDI ALUKO

WYCLIFFE OCHOKI

MARTHA OPINI

GEOFFREY MUTHINIAPPELLANTS

VERSUS

THE REGISTRAR OF TRADE UNIONS1ST RESPONDENT

COMMUNICATION WORKERS UNION2ND RESPONDENT

JUDGEMENT

1. The Appellants filed the Appeal praying for the Court to issue the following declarations, orders, directions and writ:

1. That the decision of the Registrar of Trade Union on 30.10.2014 be squashed.

2. That the appellants be given a certificate for establishment of the Kenya Union of Courier and allied Workers as a Trade Union.

3. That the Registrar of Unions to immediately issue the appellants with its certificate to establish a Trade Union.

4. That the Registrar of Trade Unions be barred from giving the reason of the existence of the 2nd Respondent as a reason for delaying or denying registration of the Kenya Union of Courier and Allied Workers.

5. That costs of and occasioned by this Cause be borne by the Respondent.

2. The Appellants aver that they are promoters for the establishment of Kenya Union of Courier and Allied Workers, a trade union under the Labour Relations Act 2007, and being of a single mind to establish a trade union, they applied to the 1st Respondent to be awarded with a certificate to establish a trade union by the name of "KENYA UNION OF COURIER AND ALLIED WORKERS" in observance with Article 12 of the Labour Relations Act.

3. They further aver that the 1st Respondent declined to issue the certificate for the establishment of the proposed trade union stating that the sector of coverage the union intended to recruit from was already represented by the 2nd Respondent, which reasons were allegedly premised on Section 14(d) of the Labour Relations Act. This refusal raised questions of law and of fact that the Court should address, needless to say that the Appellants had met all the requirements for being awarded a certificate for recruitment and the only reasons for not being awarded the certificate was that there existed the 2nd Respondent.

4. The Appellants state that the Registrar erred when she failed to issue a certificate for establishment of a trade union based on the existence

of the 2nd Respondent where the 2nd Respondent had at the date of application 0% membership from the employees of two largest private courier employers to wit G4S Courier Services and Fargo Courier limited where the two companies employ over 90% of all employees in the private courier industry.

5. They aver that when the Registrar of Trade Unions failed to issue the certificate, her decision affected more than 3000 workers in the private courier and allied sector industries who are unable to exercise their freedom of association as they are not members of the 2nd Respondent and the 2nd Respondent has not claimed that they are their members nor has it attempted to recruit them and the refusal by the Respondent is not justified.

6. The 1st Respondent filed their response to the memorandum wherein they denied each and every allegation of fact and law set out in the Memorandum of Appeal and that the appeal is not filed using the prescribed form 1 as provided under Rule 8(3) of the Industrial Court (Procedure Rules) 2010.

7. She avers that she is barred by the provisions of Section 14 of the Labour Relations Act from registering a trade union where there is an existing trade union representing the interests of the employees the proposed union intends to recruit, the scope of representation by the Appellants was already covered by the existing trade unions, namely the Communication Workers Union, the Kenya National Private Security Workers Union and the Transport Workers Union.

8. She further avers that the Appellants started to operate before they were issued with a certificate contrary to the express provision of section 12 and 23(4) of the Labour Relations Act and issuance of a certificate to the appellants is bound to create inter union rivalry and industrial unrest and she had to safeguard the same. She avers that her refusal was fair and just in terms of the provisions of the Labour Relations Act.

Submissions

9. The Appellants submit that they were qualified to be awarded the certificate to establish a trade union and followed the right procedure in the application of the said certificate hence the 1st Respondent violated Section 13 of the Labour Relations Act when she denied them the certificate.

10. They state that the private sector is emerging as huge and dynamic sector and deserve a union and the private courier sector is distinct from all other sectors including the public courier sector and a new union ought to be allowed because there is currently no union that is sufficiently representing the whole or substantial portion of the interests of private courier workers as the Respondents have failed to show any evidence of such unions.

11. The Appellants also submit that the application was done in the manner prescribed in form 1 provided under Rule 8(3) of the Industrial Court (Procedure Rule) 2010 and filed on time as well. They also submit that the Respondent did not follow the laid down procedure in declining to issue the certificate as the refusal was pre-mature, there were no written objections, she failed to compare the two institutions hence violated procedure and the appellants were condemned unheard.

12. The Respondent filed her submissions where she submitted that her action of refusing the appellants request for recruitment was well formed by law where it states that registration may be refused if any particular sector is already represented elsewhere as it was demonstrated and the enjoyment of freedom of association by the appellants as enshrined in the Constitution under the Bill of rights is limited to the extent that their enjoyment shall not be prejudicial to other party's rights as 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. She should not be seen to contribute to confusion and union rivalries which may harm the harmonious Industrial relations existing in the sector.

13. The 2nd Respondent also stated that the application was filed out of time and that the refusal to register the proposed union did not amount to infringement of the Appellants' Constitutional rights as the Appellants did not demonstrate what prejudice or loss they stood to suffer for non-registration.

14. I have examined all the averments and submissions of both parties. The Applicants wrote to the Registrar Trade Unions on 8/10/2014 seeking a certificate to establish a trade union under Section 12 of the Labour Relations Act 2007. The letter the Applicants submitted is exhibited as Appendix LA 1 and was co-signed by two people who indicated that they wished to establish a trade union called Kenya Union of Courier and Allied Workers.

15. They also stated that the union shall represent and advocate the lawful labour interests of employees in the Courier and Allied Sector.

16. On 30/10/2014, the Registrar Trade Unions replied to the Applicants referring to their letter of 8/10/2014 declining their application and stated that the Sector and coverage they intended to recruit is already represented by the Communication Workers Union of Kenya.

17. The Registrar Trade Unions stated that among members of the Communication Workers Union of Kenya are employees in the Courier and Allied Industries. She referred to the provisions of Section 14 of the Labour Relations Act which bar the Registrar Trade Unions from registering a trade union in circumstances where there is in existence of another union which is sufficiently representative of the whole or a substantial proportion of the interests in respect of which an Applicant seeks registration.

18. The Applicants aver that the decision by the Registrar Trade Union to refuse the Applicant union from recruiting stated that the Registrar of Trade Unions referred to Section 14(d) of the Labour Relations Act 2007 which Section deals with "where there are already registered trade unions".

19. They aver that at the time the 2nd Respondent had 0% membership from employees. The Appellant was focused on who are from G4S Courier Services and Fargo Courier Limited.

20. The Appellants contend that their rights and freedom under Article 2(1) and (4) of the Constitution and Section 14(d) was ignored by the Respondent. They also aver that the Respondent ignored their right under Section 36(2) of the Constitution as there is a fundamental difference between the Sector they wish to address and that of the 2nd Respondent. They also aver that the Respondent ignored their right under Section 41 of the Constitution.

21. The Appellants have submitted that Section 12 of Labour Relations Act only gives 2 grounds for declining issuance of the certificate sought but Section 14 deals with issuance of registration of a trade union and not a certificate of establishment. They therefore contend that the Respondents cited insufficient reasons for refusing to grant the certificate applied.

22. They also submit that the Respondent failed to note previous precedents where trade unions have been issued with establishment certificate and registered in the same or similar industry.

23. They cited **David Benedict Omulama and 8 Others vs Registrar Trade Union**; Hon. Judge Monica Mbaru found the decision by the Registrar Trade Unions in rejecting the application for registration of the Appellant was an infringement on the Appellants rights to join and form a trade union of their choice as protected in this open and democratic society.

24. The 1st Respondent opposed this appeal. They filed their Response to the Memorandum of Appeal on 20.7.2015 stating that the Appeal is not filed using the prescribed form as proved under Rule 83 of Industrial Court (Procedure) Rules 2010 and is therefore improperly before Court.

25. They also stated that the 1st Respondent is barred by the provisions of Section 14 of the Labour Relations Act from registering a trade union where there is an existing trade union representing the interests of employees in the proposed union.

26. They also aver that the scope of representation by the Appellants is already covered by the existing unions namely Communication Workers Union (2nd Respondent), Kenya National Private Security Workers Union and the Transport Workers Union. He contends that the 1st Respondent stated to operate before they were issued with a certificate contrary to the express provisions of Section 12 and 24(4) of the Labour Relations Act.

27. They contend that on 19.11.2014 Kenya National Private Security Workers Union had reported a trade dispute to the Minister for Labour, Social Security and Services on the Appellants intention. They submit that the enjoyment of the freedom of association by the Appellants as enshrined in the Constitution of Kenya 2010 under the Bill of Rights is limited to the extent that their enjoyment shall be prejudicial to other interested parties.

28. The 1st Respondent therefore avers that they are about to exercise due diligence in the performance of their duties and therefore decision of the Registrar of Trade Unions was fair in the circumstances.

29. The 2nd Respondent also opposed the appeal and filed their Memorandum of Reply to the Appellants Memorandum of Appeal on 27.1.2015 stating that the Appellant do not have a cause of action as against them and want their Appeal struck out.

30. The Interested Party also opposed this appeal stating that they are the ones with the mandate to represent the unionisable workers in the Transporter Industries and Allied Workers as they have recognition agreements with most upcountry Public Service Vehicle Bus Companies and Matatu Sector who also offer parcel (Courier) services. They therefore aver that the registration of the Appellants shall bring disharmony among the already registered trade unions thus causing infighting for membership among the unions to the detriment of the unionisable employees.

31. I have considered the averments and submissions of all parties. The issues for determination are as follows:-

1. Whether the decision of the Registrar Trade Unions was justified under the law in refusing issuance of pre-registration certificate to the Appellants.

2. Whether the Appellants are entitled to the prayers they have sought.

32. On the 1st issue, I note that Section 12 of Labour Relations Act states as follows:-

“Establishing a trade union or employers’ organization

1. No person shall recruit members for the purpose of establishing a trade union or employers’ organisation unless that person has obtained a certificate from the Registrar issued under this section.

2. An application for the certificate referred to in subsection (1) shall:-

a. be signed by two persons who are promoting the establishment of the trade union or employers’ organisation;

b. specify the name of the proposed trade union or employers' organisation; and

c. contain any other prescribed information.

3. 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.

4. A certificate issued under subsection (3) shall specify that:-

a. the promoters may undertake lawful activities in order to establish a trade union or employers' organisation; and

b. an application for the registration of the trade union or employers' organisation shall be made to the Registrar within six months of the date of issue of the certificate.

5. The Registrar may withdraw a certificate issued under this section if the Registrar has reason to believe that-

a. the certificate was obtained by fraud, misrepresentation or as a result of a mistake; or

b. any person has undertaken an unlawful activity, whether in contravention of this Act or any other law, on behalf of the proposed trade union or employers' organisation.

33. Section 12 of the Labour Relations Act the Section under which the Appellants sought the pre-registration process provides for only 3 conditions for this process as stated above.

34. Under Section 12(3) the Registrar of Trade Unions shall issue a certificate upon these conditions being fulfilled.

35. At this preliminary stage the Registrar of Trade Unions cannot go into further investigations as provided for under Section 14 of Labour Relations Act because Section 14 deals with the registration process itself.

36. The trend in the Employment and Labour Relations Court has been to allow the pre-registration of unions as seen from the following case law **David Benedict Omulama and 8 Others vs Registrar Trade Unions**; Hon. Judge Monica Mbaru; **Nickson Kunyu Mbura & 6 Others vs Registrar Trade Unions** and Another 2015 eKLR Hon. J. Rika states as follows:-

"14. ...there is no other consideration on the part of the Registrar Trade Unions in issue of certificate under Section 12(1) beyond these considerations contained in Section 12(3)".

37. In this Court's view the Registrar of Trade Unions in declining to issue the Application for pre-registration of the Appellants considered provisions of Section 14 of Labour Relations Act whereas the Application was made under Section 12 of Labour Relations Act. That should be the legal position. In my view the refusal was premature.

38. However this Court is guided by the law and upholds the doctrine of precedent. In **Court of Appeal Civil Appeal No. 19/2016 (Nairobi)** the Court of Appeal was faced with a similar case as he one before me and they allowed the appeal filed by Registrar Trade Unions indicating as follows:-

"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 devious of registering a trade union cannot comply with either of the provisions in isolation. Five steps in the registration of a trade union can be discerned from the Act".

39. In view of this decision, it is my finding that the Registrar Trade Unions considered Section 12 and 14 conjunctively and as such this appeal has no merit and the same is dismissed. There will be no order as to costs.

Dated and delivered in open Court this 30th day of May, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kioko for Respondents – Present

Appellants – Absent