



**REPUBLIC OF KENYA**

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

**APPEAL UNDER SECTION 30 OF THE LABOUR RELATIONS ACT NO. 14 OF 2007**

**APPEAL NO. 26 OF 2016**

**IN THE MATTER OF AN APPEAL OF THE DECISION OF THE REGISTRAR OF TRADE UNIONS**

**MURDOCK OWUOR**

**ARNOLD KEDENGE**

**JAYNE N. EMISEMBE**

**ZACHARY CHEBULOB**

**JOHN MUTHINI**

**BEATRICE AYUMA**

**JOHN MURAYA**

**JAMES M. MUNYAO**

**LEDIGU SEBASTIAN**

**JOSEPHINE NYAKWACHI**

**EMANUEL R. LOYAMORU'RO**

**(all suing as the proposers of the proposed**

**Kenya Union of Technical and Vocational Education**

**Trainers)**

**APPELANTS**

**v**

**THE REGISTRAR OF TRADE UNIONS**

**RESPONDENT**

**SEBASTIAN LUDIGO**

**1<sup>st</sup> INTERESTED PARTY**

**KEPHAS OGUWI**

**2<sup>nd</sup> INTERESTED PARTY**

**ELIZABETH CHEPTOO**

**3<sup>rd</sup> INTERESTED PARTY**

**JUDGMENT**

1. On 29 May 2015, Murdock E. Owuor and Arnold Okutoyi Kedenge (Appellants) made an application to the Respondent seeking the registration of **Kenya Union of Technical and Vocational Education and Training Authority** (*sic*) as a trade union.
2. The application was accompanied with a proposed constitution, list of names and identities of interim office bearers/founders and appropriate minutes.
3. Upon receipt of the application, the Respondent wrote to the Appellants seeking clarification on the scope of coverage of the employees/members and the nature of the *Authority*.
4. The Appellants responded on 9 June 2015 clarifying that the scope of coverage was *trainers* and also proposed change of name to **Kenya Union of Technical and Vocational Education Trainers**.
5. On 26 June 2015, the Respondent replied to the Appellants letter of 9 June 2015 indicating that the trainers proposed for membership/representation were already represented by the *Kenya Union of Post Primary Education Teachers* (KUPPET).
6. The Respondent sought the Appellants comments on that question of representation by KUPPET.
7. The Appellants responded on 1 August 2015 accepting that the proposed membership were represented by KUPPET but they that indicated that they intended to form a splinter Union.
8. The correspondence continued with a letter from the Respondent to the Appellants indicating that the proposed membership were represented by KUPPET and *Kenya Union of Employees of Polytechnics, Colleges & Allied Institutions* (KUEPCAI), and therefore the proposed membership were sufficiently represented.
9. On 19 October 2015, the Appellants wrote to the Respondent explaining that KUPPET had marginalised employees of technical institutes, that the problems and needs of trainers were different from their secondary school counterparts and that KUEPCAI only represented non-academic staff.
10. The Appellants further reminded the Respondent in the letter that the Constitution of Kenya recognised freedom of association.
11. On 29 October 2015, the Respondent informed the Appellants that the application for registration of **Kenya Union of Technical and Vocational Education Trainers** (KUTVET) had been rejected and the primary reasons given were
  - (i) the promoters had not demonstrated that vocational and education trainers were not represented by existing unions
  - (ii) the technical and education trainers were well represented by KUEPCAI
  - (iii) that under the existing law, registration of a trade union was barred where another union already existed.
12. Undeterred, the Appellants sought to revive the application for registration through a letter dated 20 March 2016 on the grounds that the Secretary General of KUEPCAI had advised them KUEPCAI represented only non-teaching staff, and further that Polytechnics and Technical Institutes had been brought under a new Act of Parliament.
13. The Respondent was further implored to consider specialisation where trade unions dedicated to special issues had been allowed.
14. On 15 April 2016, the Respondent informed the Appellants that regrettably, she could not register the proposed union (there followed correspondence between the parties culminating in the present Appeal and the Court will in due course return to the Appeal).
15. Around the same time (23 March 2016) a Mr. Martin Otieno and Mr. Kepher Oguwi (Interested Parties) applied to the Respondent to register a union called **Kenya Union of Tertiary Teachers**.
16. The Respondent replied on 15 April 2016 advising the Interested Parties that there existed another union called **Kenya Union of Employees of Polytechnics, Colleges and Allied Institutions** which represented the employees it was proposing to represent.
17. The letter also indicated that **Kenya Union of Employees of Polytechnics, Colleges and Allied Institutions** had applied to change its name to **Kenya Tertiary and School Workers Union**.
18. The Interested Parties were informed that the application had failed.
19. The Interested Parties wrote back on 27 May 2016 appealing against the rejection by the Respondent.
20. The Respondent then engaged in discussions with the Interested Parties and through a letter dated 15 September 2016, they notified the Respondent that they had resolved to change the name of the proposed union from **Kenya Union of Tertiary Teachers** to **Kenya Union of Technical and Vocational Education Trainers**.
21. For purposes of clarity, the Court notes that Respondent had through her letter dated 29 October 2015 declined to register such Union at the behest of the Appellants on the grounds that the cadre of employees sought to be represented were adequately represented by **Kenya**

***Union of Employees of Polytechnics, Colleges and Allied Institutions.***

22. However, after correspondences with the Technical and Vocation Education and Training Authority and the Ministry of Education, the Respondent issued the ***Interested Parties*** with a certificate of recruitment under section 12 of the Labour Relations Act on 21 February 2017.
23. The Appellants had on their part sought legal help, and their advocate wrote to the Respondent on 6 June 2006 seeking the issuance of a certificate of recruitment.
24. The Respondent reverted back on 16 June 2016 which prompted the advocates to respond on 19 July 2016.
25. On 17 October 2016, the Appellants lodged the instant Appeal contending that
- (a) The Respondents actions of refusal to a certificate for registration of the proposed trade union are contrary to Article 36(1) of the Constitution of Kenya wherein it is provided that:  
  
Every person has the freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.
  - b) Further, the Respondent's actions are contrary to Article 36(3)(a & b) of the Constitution of Kenya wherein it is provided that:  
  
(3) Any legislation that requires the registration of an association of any kind shall provide that –
    - i. Registration may not be withheld or withdrawn unreasonably; and
    - ii. There will be a right to have a fair hearing before the registration is cancelled.
  - c) In addition, the Respondent's actions are contrary to the provisions of Article 41(2)(c) where forming, joining or participating in the activities and programs of a trade union are one of the Constitutional rights of any worker.
  - d) The Respondent's actions are contrary to the provisions of Article 47(1) of the Constitution that entitles the Appellants to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
  - e) There is also violation of the Appellants right of receiving a written response and proper reason for the refusal or otherwise to register the proposed union.
  - f) That despite and/or in spite of the Appellants application for a certificate for registration of the proposed trade union being in accordance with the law; both substantively and procedurally the Respondent has used ulterior, unwarranted and unjustifiable reasons to reject the Appellants application for registration.
  - g) The Appellants application for a certificate for registration of the proposed trade union was in line with and conformed with the relevant provisions of the law being the provisions of section 12 of the Labour Relations Act 2007 and there is no legal justification for rejection of the Appellants application.
  - h) On the contrary, the Respondents refusal to issue a certificate for registration of the proposed trade union was contrary to the provisions of Section 12 of the Labour Relations Act of 2007 which is coached in mandatory manner.
  - i) The Respondent failed to take into account the Court decisions in regard to the considerations for registration or refusal of registration of a trade union and made a biased decision based on irrelevant considerations.
  - j) The decision runs contrary to the current trends and court decisions.
  - k) The Appellant's Union covers an unmet area and need. In the unlikely event it does not, the courts have held that the constitutional right to form and join a union of choice is supreme and an overriding issue over other considerations.
  - l) The decision to refuse to issue a certificate for registration of the proposed trade union based on the existence of a union representing the whole or a substantial portion of the persons the Appellant's seek representation is wrongful, unlawful, illegal, unconstitutional and contrary to the norms of a modern democratic society.
26. On 27 February 2017, Elizabeth N. Gicheha, the Registrar of Trade Unions filed a replying affidavit in opposition to the Appeal. She deposed therein that she had issued a certificate to the ***Interested Parties*** on 21 February 2017.
27. When the Appellants established that the Respondent had issued a certificate of recruitment to the Interested Parties, they filed a motion on 31 March 2017 seeking an order to amend the Memorandum of Appeal to enjoin the ***Interested Parties*** into the Appeal.
28. Abuodha J allowed the application on 20 September 2017 and the Appellants filed an *amended Memorandum of Appeal* on 9 October 2017.

29. The *amended Memorandum of Appeal* introduced Sebastian Ludigo, Kephias Oguwi and Elizabeth Cheptoo as **Interested Parties** and sought an order for the cancellation of the certificate of registration issued to them (Interested Parties).
30. When the Appeal was mentioned before me on 23 January 2018, the Respondent indicated that she would not file an amended Response while the Appellants proposed that the Appeal be determined on the basis of the record and submissions to be filed.
31. The Court agreed to the proposal and both the Appellants and Respondent filed their submissions on 12 March 2018.
32. The submissions were highlighted on 13 March 2018 and the Court reserved judgment to today.
33. In the course of preparing the judgment, the Court noted that Respondent's replying affidavit failed to make certain disclosures and that there was no evidence that the Interested Parties had been served with the amended Memorandum of Appeal.
34. In a ruling delivered on 6 April 2018, the Court directed the Deputy Registrar to notify the parties to attend Court for further directions/clarifications.
35. As a consequence, the Respondent filed a further affidavit on 19 April 2018.

## Evaluation

### *Service on Interested Parties*

36. Although the Appellants advocate informed the Court on 20 April 2018 that the Interested Parties had been served with the *amended Memorandum of Appeal* and an affidavit of service filed, the Court has not seen any such affidavit on record.
37. The Court will therefore not make any adverse findings against the Interested Parties as sought by the Appellants.

### *Certificate of Recruitment*

38. Before the establishment of a trade union, the Labour Relations Act contemplates a 2 stage process. There are the requirements under section 12 and those under section 14 of the Labour Relations Act.
39. Section 12 of the Labour Relations Act envisages the Registrar of Trade Unions issuing a *certificate of recruitment* and Section 14 of the Act provides for a *certificate of registration* of a trade union.
40. Under section 12, the Respondent can decline to issue a *certificate of recruitment* where the application is *defective* or the *name of the proposed trade union is the same as an existing trade union or the proposed name is sufficiently similar with another union so as to cause confusion*.
41. Under this initial stage, a textual reading of the section does not envisage the Respondent considering the factors outlined in section 14 of the Labour Relations Act in order to reject an application.
42. In declining to issue the Appellants with a certificate, the Respondent did not set out in her letter of 29 October 2015 any *defect* in the application or *the existence of a union with a similar name as the one proposed by the Appellants*.
43. The Respondent, it appears muddled up the requirements and or factors to be considered while issuing a *certificate of recruitment* under section 12 of the Act with those under section 14 of the Act which apply before issuance of a *certificate of registration* of a trade union.
44. In applying the conditions envisaged under section 14 of the Labour Relations Act instead of those under section 12 of the Act, the Respondent misapprehended the law in respect to the application by the Appellants, and on that score, the Court would allow the Appeal.
45. However, the circumstances and facts presented in Court suggest that there was more than met the eye in the action by the Respondent.
46. The facts suggest that the Respondent may have been acting mischievously, for why deny registration to **Kenya Union of Technical and Vocational Educational Trainers** as proposed by the Appellants, and within a span of months allow the Interested Parties to change the name of their proposed union from **Kenya Union of Tertiary Teachers** to **Kenya Union of Technical and Vocational Education Trainers** and grant a *certificate of recruitment* under section 12 of the Labour Relations Act.
47. The Respondent was not being even handed or playing fair.
48. The reasons (if valid) she gave for declining to issue a *certificate of recruitment* to the Appellants should have equally applied to the application by the Interested Parties.
49. Had the Interested Parties participated in the proceedings and in light of the unlawful conduct by the Respondent, the Court would have been minded to order cancellation of the certificate issued to them.

## Limitation

50. In terms of section 30 of the Labour Relations Act, an appeal from the decision of the Registrar of Trade Unions should be lodged in Court within 30 days.

51. The Respondent's decision was made on 29 October 2016 while the Appeal was lodged in Court on 17 October 2017, without leave.

52. The Appeal therefore was filed outside the prescribed time.

53. But in view of the patently unlawful conduct of the Respondent, the Court will in the interest of substantive justice disregard that provision.

54. In fashioning an appropriate order, the Court has considered that the application by the Interested Parties has not yet gone through the process contemplated by section 14 of the Labour Relations Act.

#### **Conclusion and Orders**

55. The Court allows the Appeal and orders that

a) An order do issue compelling the Respondent to reconsider the Appellants application under section 12 of the Labour Relations Act.

56. Each party to bear own costs.

**Delivered, dated and signed in open Court in Nairobi on this 4<sup>th</sup> day of May 2018.**

**Radido Stephen**

**Judge**

**Appearances**

For Appellants            Ms. Nkonge instructed by Enonda & Associates

For Respondent        Ms. Kinyua, State Counsel, Office of the Attorney General

Court Assistant        Lindsey