



**REPUBLIC OF KENYA**

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

**APPEAL NO. 29 OF 2016**

**ADEL W. OTTOMAN**

**ENOCK WANYONYI**

**CHRISPINE MOMANYI**

**DOROTHY MUMBI NJERU**

**CLIFF RANDA**

**ALUSA CLAUDETTE**

**(suing on behalf of themselves and all other**

**members of the Medical Laboratory Officers**

**Union).....APPELLANTS**

**v**

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

**KENYA UNION OF DOMESTIC, HOTELS,**

**EDUCATIONAL INSTITUTIONS AND**

**HOSPITAL WORKERS.....1<sup>ST</sup> INTERESTED PARTY**

**UNION OF KENYA CIVIL SERVANTS.....2<sup>ND</sup> INTERESTED PARTY**

**CENTRAL ORGANISATION OF TRADE**

**UNIONS OF KENYA.....3<sup>RD</sup> INTERESTED PARTY**

**JUDGMENT**

1. On 22 October 2015, Enock Wanyonyi and others (hereinafter the Appellants) applied to the Registrar of Trade Unions (Respondent) for the registration of *Kenya National Union of Medical Laboratory Officers* (proposed union).

2. The Respondent replied to the application on 10 November 2015 informing the Appellants that a similar application had been made and that the targeted members were already represented by *Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers* (KUDHEIHA).

3. The Respondent also requested the Appellants to demonstrate that the proposed union was targeting unique and unrepresented workers.

4. The Appellants reverted to the Respondent on 13 November 2015 maintaining that irrespective of past failed applications, they were committed to represent employees in the medical laboratory sector.

5. On 18 November 2015, the Respondent issued a certificate in terms of section 12 of the Labour Relations Act, thus leading the Appellants to apply for registration on 5 December 2015.
6. On 4 April 2016, the Respondent caused to be published a gazette notice seeking for objections to the registration of the proposed union, pursuant to the provisions of sections 14, 15 and 17 of the Labour Relations Act.
7. COTU (K), KUDHEIHA and Union of Kenya Civil Servants (UKCS) submitted objections to the registration and the Respondent called upon the Appellants through a letter dated 14 April 2016 to respond to the objections.
8. The Appellants responded on 13 June 2016, and on 16 June 2016, the Respondent advised them that the issues raised would be considered by *the National Labour Board* on 6 July 2016.
9. Consequent upon the meeting of the *National Labour Board*, the Respondent wrote to the Appellants on 24 October 2016 notifying them that after consultations with the Board, their application for registration had been rejected.
10. The reason given for the rejection were in summary, existence of other trade unions (KUDHEIHA and UKCS) which the Respondent indicated were sufficiently representative of the membership targeted by the Appellants.
11. The rejection prompted the Appellants to lodge a Memorandum of Appeal with the Court on 22 November 2016.
12. Although served, the Respondents did not file any responses to the Memorandum of Appeal, and on 23 October 2017, the Appellants applied to the Court to have the Appeal heard on a priority basis, among other orders. The application also introduced the Interested Parties into the Appeal (without seeking leave).
13. On 8 November 2017, the Attorney General filed a Notice of Appointment of Advocate on behalf of the Respondent and a replying affidavit sworn by E.N. Gicheha in opposition to the Appeal.
14. The 2<sup>nd</sup> Interested Party filed a replying affidavit in opposition to the application for hearing on a priority basis on 30 January 2018.
15. The Court heard addresses from the parties on the application, and on 2 February 2018, the Court issued directions as to the filing of an amended Memorandum of Appeal, responses and submissions.
16. The Appellant filed an *Amended Memorandum of Appeal* on 28 February 2018, and submissions on 13 April 2018, the Respondent filed her submissions on 3 June 2018 and the Appellants filed further submissions on 12 June 2018.
17. The Interested Parties did not file any responses/submissions.

### **Grounds of Appeal**

18. 12 grounds of appeal were set out in the *Amended Memorandum of Appeal* to wit
  - 1) That the Respondent erred in both law and fact in failing to find that the Medical Laboratory Profession is a unique health profession that involves numerous Medical Laboratory Professionals practicing in such specialised areas like disease diagnosis, treatment monitoring, disease surveillance, epidemiological survey of diseases in public health, teaching in universities and colleges and working in medical Research Institutes and they therefore rightly deserve protection and representation by a trade union that is specific to the needs of the Medical Laboratory Profession.
  - 2) That the Respondent erred in both law and fact in failing to find that objecting unions, namely Union of Kenya Civil Servant (UKCS), Kenya Union of Domestic, Hotels Educational Institutions and Hospital Workers (KUDHEIHA) are not sufficiently representative of the whole or substantial proportion of the interests of members of the Medical Laboratory Profession whose interests the proposed union sought to cover and protect.
  - 3) That the Respondent erred in law and fact by failing to find that the existing registered Unions in Kenya do not adequately represent the interests of specialised cadre of the Medical Laboratory Professionals.
  - 4) That the action of the Respondent is discriminatory to the Appellants and amounts to selective application of the law as there exists specialised Unions catering for specialised cadres of Medical Practitioners in health sector, namely Kenya National Union of Nurses (KNUN) and Kenya Medical Practitioners Pharmacists and Dentists Union (KMPDU) but there is no existing registered Union that caters for the specialised interests of Medical Laboratory Science Practitioners.
  - 5) That the Respondent erred in both law and fact in failing to find that the constitution, statutory law and various international treaties that Kenya has ratified entitle individuals to freedom of association, which includes right to form, belong to and participate in trade unions of their choice and the decision appealed from is a violation of this fundamental right.
  - 6) That refusing registration of the proposed union, the Respondent proceeded without granting the interim officials of the proposed union a fair hearing contrary to law and the rules of natural justice.

7) That in refusing registration of the proposed union, the Registrar failed to take into account relevant factors and proceeded on the basis of irrelevant facts.

8) That the Respondent failed in both law and fact by failing to exercise statutory powers vested on the Respondent but instead unlawfully delegated these powers to other bodies and in refusing registration of the proposed union the Respondent abdicated the statutory powers and duties imposed in that office and subordinated the office to the National Labour Board.

9) That the Respondent failed and misdirected herself in both law and fact by failing to make a decision on the registration of the proposed union but instead communicated the decision of the National Labour Board which is not statutorily mandated to decide on the application of registration of the proposed union.

10) That the decision to deny registration was against the Appellants legitimate expectation to fair, reasonable and lawful administrative action.

11) That the decision to deny registration of the proposed union is unreasonable, in bad faith and amounts to unfair refusal to exercise statutory power.

12) That on the whole, the decision of the Respondent does not adduce any sufficient reasons to justify the act of refusal to register the proposed union and is unjustifiable and unsupported by the facts and the law relevant to the matter.

19. The Court has considered the material placed before it and come to the view that some of the broad grounds of appeal presented by the Appellants can be condensed and considered together.

### **Existence of trade unions**

20. Grounds 1 to 4 broadly challenged the Respondent's main ground for refusing them registration on the ground that there existed other registered trade unions sufficiently representative of employees in the medical laboratory field.

21. The Respondent enumerated the unions as the *Union of Kenya Civil Servants* and the *Kenya Union of Domestic, Hotels, Educational Institutions and Hospital Workers* (1<sup>st</sup> and 2<sup>nd</sup> Interested Parties).

22. Assuming that the constitutions of these 2 Interested Parties provided for them to organise within the medical laboratory sector, the Respondent however did not provide any evidence or data to the Court to show that the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties had membership (or had recruited) within the target audience of the proposed Union.

23. Even these 2 Interested Parties did not provide the Court with any evidence that they had membership among the employees targeted by the Appellants.

24. Where the Registrar of Trade Unions refuses registration on account of an existing union or such existing unions raise an objection, it is the view of this Court that factual evidence in terms of copy of respective constitutions and list of members should be made available.

25. For the Union(s), it should at the very least demonstrate that it has recruited and/or has membership in the sector targeted by the proposed/rival union.

26. The mere provision in the constitution without more, should not be enough to satisfy the Registrar of Trade Unions that there is a union sufficiently representative of the targeted membership.

27. The Registrar of Trade Unions should in such a situation go beyond an academic exercise of examining the constitutions of the existing unions by looking at actual data.

28. The Court therefore finds that the Respondent and the Interested Parties did not demonstrate to the required standard that the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties were sufficiently representative of the employees targeted by the Appellants proposed Union.

### **Natural justice**

29. In grounds 6 and 10, the Appellants took the position that they were not afforded an opportunity to be heard and reference was made to *Judge of the High Court & Ar v Nguni* (2007) 2 EA 201.

30. According to the Appellants, the lack of rules to determine objections under section 14 of the Labour Relations Act required the Respondent to observe or fashion rules which would be in compliance with constitutional justice and that in the instant case, the rejection of registration was null and void.

31. In short, the Appellants were contending that they were not afforded a fair opportunity to controvert the objections from the Interested Parties.

32. It is correct that detailed rules have not been put in place to regulate the registration of trade unions.

33. But in the case at hand, the Respondent notified the Appellants of the grounds upon which she intended to deny them registration and the Appellants were afforded an opportunity to make written representations, twice.

34. In the view of the Court, the opportunity given to the Appellants twice to make representations met the bare minimums of natural justice, even without an oral hearing.

#### **Determination by/role of National Labour Board**

35. The Appellants contended in grounds 8, 9 and 11 that the decision to deny registration to the proposed union was made by the *National Labour Board* and not the Respondent as the Registrar of Trade Unions. It was contended that the Respondent had abdicated her statutory responsibility.

36. The Appellants drew parallels with the situation obtaining in *Justus Aloo Ogeka & 6 Ors (as interim officials of Kenya National Union of Cooperatives Staff) v Registrar of Trade Unions & 2 Ors* (2016) eKLR wherein the Court held that the role of the *National Labour Board* was merely advisory, and where the Registrar appears to convey the decision of the Board, that amounts to abdication of statutory duty.

37. The Court would agree with the views expressed in the decisions cited by the Appellants. The Respondent may want and could be enjoined to consult with the *National Labour Board*, but ultimately, the decision whether to register or not register a trade Union vests in the office of the Registrar of Trade Unions.

#### **Section 14(1)(d) of LRA ultra vires**

38. Appellants submitted that section 14(1)(d) of the Labour Relations Act which the Respondent relied on was anchored on section 80(2)(d) of the former Constitution and was inconsistent with Articles 32,33,36,37 and 41 of the Constitution and the Court's attention was drawn to the cases of *David Benedict Omulama & 8 Ors v Registrar of Trade Unions & Ar* (2014) eKLR and *Seth Panyako & Ors v Attorney General* (2013) eKLR.

39. In the Court's view, this is not a suitable case to examine the constitutionality of the aforesaid section of the Labour Relations Act considering the conclusions on grounds 1 to 4 of the *Amended Memorandum of Appeal*.

40. The Court would adopt a similar view of the other grounds not expressly examined in this judgment.

#### **Conclusion and Orders**

41. In light of the above, the Court allows the Appeal in terms of prayers 1 to 4 of the *Amended Memorandum of Appeal*.

#### **Costs**

42. The Appellants filed voluminous documents some of which were not necessary for the expeditious and proportionate determination of the Appeal as the law on registration of trade unions is now fairly settled.

43. The Court orders that each party to bear own costs.

**Delivered, dated and signed in Nairobi on this 27<sup>th</sup> day of July 2018.**

**Radido Stephen**

**Judge**

#### **Appearances**

For Appellants                      Kamau Kuria & Co. Advocates

For Respondent                      L. Odhiambo, State Counsel, Office of the Attorney General

2<sup>nd</sup> Interested Party                      Rachier & Amollo, Advocates

Other Interested Parties                      did not participate

Court Assistant                      Lindsey