



**REPUBLIC OF KENYA**  
**EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**APPEAL NO. 12 OF 2016**

(Before Hon. Lady Justice Hellen S. Wasilwa on 31<sup>st</sup> January, 2017)

BARNABAS LAGAT .....1<sup>ST</sup> APPELLANT

JOHN GITHUA MBATE ..... 2<sup>ND</sup> APPELLANT

VERSUS

THE REGISTRAR OF TRADE UNIONS.....1<sup>ST</sup> RESPONDENT

HON. ATTORNEY GENERAL .....2<sup>ND</sup> RESPONDENT

AND

KENYA NATIONAL UNION OF TEACHERS .....INTERESTED PARTY

**JUDGMENT**

1. The Appeal before the Court is dated 3<sup>rd</sup> June, 2016, being an Appeal against the decision of the Registrar of Trade Unions made on the 29<sup>th</sup> March, 2016, refusing issuance of a Certificate of Recruitment to the Appellants herein.

2. The Appeal is based on the following grounds:-

*a. That the Appellants are duly licensed teachers in Kenya by the Teachers Service Commission under the TSC number 274321 and 140775 respectively.*

*b. The Appellants together with several other teachers, in exercise of their rights of association as enunciated under Article 36 of the Constitution of Kenya and enacted under Section 4 of the Labour Relations Act being desirous of forming themselves into Trade Union under the name Kenya Teachers Congress held a meeting on the 29<sup>th</sup> February where the Appellants were mandated to commence a process of registering the union.*

*c. The Appellant vide a letter dated 7<sup>th</sup> March, 2016, lodged with the 1<sup>st</sup> Respondent their application for the registration of Kenya Teachers Congress.*

*d. The Appellant fulfilled all the statutory requirements to be issued with the Certificate of*

**recruitment under Section 12 of the Labour Relations Act.**

***e. Through a letter dated 29<sup>th</sup> March, 2016, the 1<sup>st</sup> Respondent expressed its decision to decline the issuance of the said certificate on grounds that there are other unions that have covered under the particular sector targeted by the Kenya Teachers Congress and the second reason was that the Kenya Teachers Congress could not be registered because it did not meet the provisions of section 14 of the Labour Relations Act.***

***f. The 1<sup>st</sup> Respondent erred in declining to issue the certificate of recruitment on grounds other than those provided for in the law in the sense that an application under section 12 of the Labour Relations Act should be declined if the Application is incurably defective, secondly if the proposed name already exists or is so similar to an existing union as to cause confusion. The 1<sup>st</sup> Respondent did not raise any of those grounds as the reasons for declining the issuance of certificate of recruitment.***

***g. The 1<sup>st</sup> Respondent erred by relying on the wrong provisions of the law in declining to issue the Certificate of recruitment. The Labour Relations Act provides for a two-tier procedure for registration or a Trade Union which involves application for a certificate of recruitment under section 12 on the one hand and application for registration of the trade union under section 13 as read with section 14 of the Act on the other hand an Applicant cannot fulfill the requirements of section 14 of the Act without the certificate of recruitment under section 12 of the Act.***

3. The Application is supported by the Affidavit of John Githua Mbate wherein they restate the grounds on the face of the Application.

4. The Respondents have filed an Affidavit wherein they admit that the Appellants lodged an Application for a Certificate of Recruitment with the 1<sup>st</sup> Respondent on 7<sup>th</sup> March, 2016, to which they responded stating that the Application had failed citing the reasons that the coverage of clients targeted is already sufficiently represented.

5. The Respondents state that the 1<sup>st</sup> Respondent is barred by Section 14 of the Labour Relations Act from registering a Trade Union where there is already an existing Trade Union(s) representing the interests of the employees the intended Union intends to recruit.

6. They state that the right to form and join a Trade Union is limited to the extent that their enjoyment shall not be prejudicial to other parties' rights. They state that the issuance of a Recruitment Certificate is bound to create friction between the proposed Union and the existing Unions as they compete for members resulting in unhealthy labour relations.

7. They further contend that there is already a Trade Union by the name of Trade Union Congress which the Interested Party herein is affiliated with and this may cause confusion and mislead the teaching fraternity.

8. The Respondents urge the Court to find the decision to decline to register the intended Union lawful and uphold the same.

9. The Appeal is also opposed by the Interested Party, Kenya National Union of Teachers (KNUT) who have filed a Replying Affidavit in which they state that they are entitled by virtue of its Constitution and the Labour Relations Act to recruit unionisable members across the Country into union membership.

10. They state that sometime in February-March 2016, the Union held elections for National and Branch offices and the Appellants being members of the Interested Party vied for elective positions where they all lost.

11. The Interested Party further contends that the Appellants having been aggrieved by their unsuccessful

bids for elective positions, they sought to register an outfit by the name of Kenya Teachers Congress which the 1<sup>st</sup> Respondent refused to do.

12. The Interested Party states that the Appellants form part of its membership and have not resigned as they are required to do.

13. The Interested Party further state that the application for registration by the Appellants did not meet the mandatory requirements of the Law and as such the Registrar's reasons for declining to register the Appellants outfit were sufficient.

14. It is the Interested Party's position that the Appellants are not genuine in seeking to register the outfit 'Kenya Teacher's Congress' and that they are not advancing the interest of those they purport to represent in their quest to register a new Trade Union but are advancing their own selfish interest bent on destabilizing the Labour Sector and Trade Unionism in the Country.

15. They pray for the Appeal to be dismissed with costs.

16. The Appellants have also filed an Affidavit in support of the Appeal wherein they state that the Registrar has overstepped her mandate by failing to register the Trade Union.

17. They contend that denial to register only arises after an application has been made under Section 13 and 14 of the Labour Relations Act No. 14 of 2007. Once such Application has been made they state that the Registrar is bound to invite any Trade Union to raise an objection after exhausting the mandatory requirements of Section 14(1) (d) of the Labour Relations Act.

18. The Appellants further contend that the Interested Party's objection is premature as it is only after they had duly complied in making an application for registration that the Registrar would have invited them to raise any objection.

19. It is the Appellants' contention that the 1<sup>st</sup> Respondent did not examine their Constitution to establish whether the interest the intended Union intends to cater for and those of rival Unions were similar. They allege that the intended Union's area of focus is different from those of other Teachers' Unions as it aims to cover all key stakeholders in the education sector.

20. The Appellants further allege that the Registrar has not demonstrated why the Appellants' right to form and join a Trade Union should be limited as other Trade Unions with similar membership have been registered in the past.

21. They state that the decision not to register the intended Trade Union is thus discriminatory and ought to be quashed and a Certificate of Recruitment to be issued.

### **Submissions**

22. The Appellants submit that they have fulfilled the requirements for registration of a Trade Union espoused in Section 12 of the Labour Relations Act. They state that the issuance of a Certificate is automatic upon complying with the requirements set out under Section 12(2) unless the Registrar can prove that the application is defective or that the proposed name is similar to that of an existing Trade Union.

23. They further submit that the objections by the Interested Party are premature as they have not applied for registration yet and have only sought a Certificate of Recruitment. They hold the view that the objections should only be invited upon an application for registration of the intended Union.

24. They rely on the case of **Japheth Anyira Agura & 6 others Vs. Registrar of Trade Unions (2014) eKLR** where Rika J held:

***“...the purpose of inviting objections publicly is meant to assist the Registrar in determining if proposed trade union registration would conflict with the interests sufficiently represented by another Trade Union, resulting in demarcation disputes and industrial disharmony. In the absence of objections filed with the Registrar, he has no reason to scour his Registry for constitutions of the various Trade Unions which have not lodged any objection, with the intention of assessing if they are sufficiently representative. The consideration of the application must be limited to the Trade Unions which have specifically made their objections known formally in written reaction to the invitation made in the Gazette Notice.”***

25. They submit that the Registrar in rejecting the Application for issuance of Certificate of Recruitment and placing reliance on Section 14 acted beyond her mandate enshrined in Section 12 of the Labour Relations Act.

26. The Appellants further submit that the 1<sup>st</sup> Respondent did not act reasonably, justifiably and within the ambits of the law. They state that the right to form and join a Trade Union and freedom of association are constitutional rights which have been violated by the 1<sup>st</sup> Respondent. They cite the case of **Scientific Research International Technical & Allied Workers Union vs. Kenya Agricultural Research Institute & Another (2013) eKLR** where it was held:

***“Recognition of Trade Unions rests on freedom of association. Employees have the right to join and leave Trade Unions. Recruitment is a continuous process. Even where an Employer has formally granted Trade Union recognition, employees belonging to that recognized Trade Union are not barred by any law from shifting allegiance to another Trade Union. Freedom of Association acknowledges the right to associate is co-joined to the right to dissociate; just as the right of recognition includes the right of de-recognition. Employees look at the Trade Union that is best placed to articulate their collective rights and interests of the moment, and do not take a lifelong vow of fidelity, by joining any trade union.”***

27. In response to the contention by the Respondents that the Right to Freedom of Association is not an absolute right they state that, the right of the freedom of association can only be limited by law and that the limitation should be reasonable and justifiable based on human dignity, equality and freedom. They rely on the case of **NTN Pty Ltd and NBN Ltd vs. The State (1988) LRC (Const) at 348** where it was held that:

***“What is reasonably justifiable in a democratic society is not a concrete or precise concept. It entails different policy and executive considerations. Traditionally, courts are kept out of this field. This is a new field of intrusion by the Constitution. The Court is to be careful in saying what it is. I do not think it is a concept which can be precisely defined by Courts. There is no legal yardstick. What has been decided by Courts can only be a guide as to the nature of this illusive principle. The test, really, is an objective one. The application of the test must be considered within the context of the subject matter or circumstances of each case.”***

28. They submit that the extent of the limitation provided under the Constitution and Section 14 is not absolute as the Registrar has discretion to register a new Trade Union notwithstanding the existence of a rival Trade Union since Trade Unions do not enjoy monopoly.

29. They pray for the Appeal to be allowed as drawn.

30. The Respondents in their submission state that the 1<sup>st</sup> Respondent acted within the law in declining to issue a Certificate of Recruitment to the Appellants.

31. They state that the interest sought to be represented by the intended Union are similar to those of existing Unions namely the Kenya National Union of Teachers, Kenya Union of Post Primary Education Teachers, Kenya Union of Pre-Primary Education Teachers and Kenya Union of Special Need Education Teachers. They state that issuance of the Certificate of Recruitment would be prejudicial to the aforementioned Trade Unions.

32. They pray for the Appeal to be quashed.

33. The Interested Party has also filed submissions wherein they state that the 1<sup>st</sup> Respondent acted within the law in refusing to register the Appellants' outfit.

34. They state that the provisions of Sections 12 and 14 were complied with by the 1<sup>st</sup> Respondent and as such the Appeal must fail. They state that the right to join and form a Trade Union is not absolute and rely on the case of **Charles Salano & 9 Others vs. The Registrar of Trade Unions & Another (2015)eKLR** wherein it was held:

*“...Trade Union movement is concerned with protection of workers and employers rights as a collective. This right is protected under article 41 of the Constitution, International Laws and ILO Conventions. The right however is not absolute. It can be regulated or limited in context of Article 24 of the Constitution. That is, such regulation or limitation must be seen in the context of what is permissible in an open and democratic society. Therefore in so far as the right to join, leave or form a trade union of one's choice goes, no union can be registered if there is already in existence a union which sufficiently represents the interest of the workers or employers sought to be represented by the new union. The application was submitted to the Registrar. She had the benefit of looking at the entire application together with the documents in support and become of the view that the interest sought to be represented by the appellant was already sufficiently represented by the interested party...”*

35. They further submit that the Appellants have not come to Court with clean hands and are intent to cause disharmony in the representation of teachers' interests. They rely on the case of **Kenya Health Professionals Union (KHPU) vs. Registrar of Trade Unions & Another (2015)eKLR** where it was held:

*“The ILO Convention sets the bar, the municipal law of Kenya brings it to life. The Union that the Petitioners propose is one that would be superfluous or superfluous to requirements. The health professionals who are proposed members of the Respondent are already catered for in the existing trade unions. If that were not so, each craft would have a union. There is therefore justification to refuse registration of a union that is intended for a sector that is adequately represented. The upshot of the foregoing is that the application has no merit and is dismissed with costs to the Respondent.”*

36. The Interested Party states that the Registrar acted within the law and as such the Appeal should be quashed with costs.

37. Section 12 of the Labour Relations Act provides for how a Trade Union may be registered. The Section states as follows:

*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.***

38. Under the law there are parameters that the Registrar of Trade Unions must employ upon receiving an Application for the Certificate to recruit members into a Union as seen at (2) above.

39. Upon receiving Application, the Registrar of Trade Unions shall issue a Certificate within thirty days of the receiving of an Application unless (3) above applies.

40. In the case of the Appellants above, they made their Application for recruitment of members to a Trade Union vide a letter dated 7/3/2016 indicating that one Barnabas Lagat and Mbate John Githua were the ones applying to recruit members to a Trade Union under the name Kenya Teachers Congress.

41. Section 12 (1) and (2) of Labour Relations Act above was thus complied with. The Registrar of Trade Unions would have issued the Certificate applied for within 30 days from 7.3.2016 but she didn't and vide a letter dated 29<sup>th</sup> March 2016 indicated as follows:

***"RE: APPLICATION FOR A CERTIFICATE OF RECRUITMENT***

***Reference is made to your application Reference No. OAK/K009/001/1/2016 dated 7<sup>th</sup> March 2016. I wish to inform you that the particular sector of coverage your clients are targeting is already represented elsewhere.***

***The Early Childhood (ECD) Teachers are already represented by the Kenya Union of Pre-Primary Education Teachers (KUNOPPET) whose sector of coverage includes all teachers in ECD. All categories of School Teachers are already represented by the Kenya national Union of Teachers (KNUT) whose membership includes every registered teacher, Certified, Licensed or Authorized to teach. Kenya National Union of Teachers (KNUT) therefore represents all the teachers.***

***In addition, the Kenya Union of Post Primary Education Teachers (KUPPET) represents all teachers in Second and Tertiary Institutions. Further, the Kenya Union of Special Needs Education Teachers (KUSNET) represents every trained and on training registered teachers by the Teachers Service Commission, other Ministries and departments working as Special needs.***

***Arising from the above, you notice that the intended sector of coverage is sufficiently represented by the already registered Unions. The Labour Relations Act (LRA) under Section 12 read***

***together with Section 14 provides that a proposed Trade Union would engage on recruitment for the sectors where no other Union exists. Under the said provisions therefore, it is legally wrong to issue a Certificate of Recruitment leading to registration in a sector where another Trade Union(s) already exists.***

***I therefore regret to inform you that your application fails.***

***Signed***

***E. N. GICHEHA (MRS)***

***REGISTRAR OF TRADE UNIONS “***

42. From this letter, the reasons the Registrar of Trade Unions gave for not issuing the Certificate applied for was that other Unions cover the areas of the new union intends to cover and that the unions are sufficiently representing the interests the Appellants wanted to cover.

43. Under Section 12(3) above however the Registrar of Trade Unions may decline to issue the Certificate if the name is similar to an existing one or is sufficiently similar so as to mislead or cause confusion.

44. The issues raised by the Registrar of Trade Unions in her reply however shifts from the provision of Section 12(3) of the Registrar of Trade Unions.

45. The Registrar of Trade Unions has not stated that there is another Union with a similar name or sufficiently similar name to the one that seeks to be registered.

46. The Interested Party on the other hand submits on issues of registration of a Union and not issuance of a Certificate for Recruitment. The issue of registration of a Trade Union follows 6 months after the issue of Certificate of recruitment.

47. In my view, the Registrar of Trade Unions' actions were premature and were based on issues of registration of a Trade Union and not on issues of recruitment for members for an intended Union.

48. For these reasons, I find that the decision by the Registrar of Trade Unions to deny the Appellants their Application for a Certificate of Recruitment of members to the intended Union was not reasonable and justifiable.

49. I declare that decision null and void and direct the Registrar of Trade Unions to issue the Appellants with the Certificate so prayed for within **14 days** from the date of this Judgment. The Appeal succeeds.

Read in open Court this 31<sup>st</sup> day of January, 2017.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Achach for the Appellants – Present

Miss Kwega for Interested Party – Present

Odukenya for Respondent –Present