



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

ELRCA NO. 5 OF 2016

NICKSON KUNYU MBURA & 6 OTHERS.....CLAIMANTS

VS

REGISTRAR OF TRADE UNIONS.....RESPONDENT

ALMAGAMATED UNION OF KENYA METAL WORKERS...1ST INTERESTED PARTY

CENTRAL ORGANISATION OF TRADE UNIONS (K).....2ND INTERESTED PARTY

FEDERATION OF KENYA EMPLOYERS.....3RD INTERESTED PARTY

KENYA ENGINEERING WORKERS UNION.....4TH INTERESTED PARTY

**(BEING AN APPEAL FROM THE DECISION OF THE REGISTRAR OF TRADE UNIONS DATED
26.4.2016)**

JUDGMENT

Introduction

1. The appellants are the promoters of the Kenya Basic Metal Workers Union (KBMWU) which seek to represent employees within the Basic Metal Work Industry. It is the appellants' case that they complied with the law when they applied for the registration of the KBMWU on 12.5.2016 but the respondent rejected the application, hence this appeal. The appeal seeks direction that the respondent does register the appellants union and forthwith issue certificate of registration.

2. The respondent has admitted that that she received the application for registration of the said trade union from the appellants and notified the same to the public and invited objections from existing unions in the relevant industry as required by the law. That in response she received objections from the 1st interested party citing duplication of trade unions and likelihood of disharmony in the industry as the reason for their objection.

3. As required by the law the respondent forwarded both the application and the objections to the National Labour Board for advice. That after consideration the Board advised her to reject the application because the workers in the Basic Metal Work industry were already adequately and substantially represented by the Amalgamated Union of Kenya Metal Workers (AUKMW), Kenya Engineering workers Union (KEWU) and the Kenya Electrical Trade and Allied Workers Union (KETAWU). She therefore pays for the dismissal of the appeal because the refusal to register the proposed union was proper and justified.

4. The first interested party who objected to the registration of the proposed union has now been joined by the other three interested parties herein to oppose the appeal and object to the registration of the proposed union. According to the interested parties, the workers in the industry are already well represented by them and they have received recognition and signed collective Agreements with several employers. Consequently, it is their case that registration of another union in the same industry would lead to disharmony and unhealthy competition for members. The appeal was disposed of by way of written submissions.

Appellants' case

5. The appellants submitted that they exercised their right to organize and form a trade union under Article 36 (1) and 41 (1) (c) & (5) of the constitution, Section 4 (1) (a) of the Labour Relations Act (LRA) and the ILO Convention 87 by applying for the registration of the proposed union as the union to represent workers in the industry. To begin with, they applied for a Certificate for Recruitment from the respondent but it was denied until they obtained a court order. That after recruiting members they lodged the formal application for the registration of the union in compliance with the law but again the respondent refused to register the union.

6. The appellants further submitted that the respondent did not consult the Labour Board before refusing to register the proposed union and wondered where were the Board minutes if at all the board discussed their application and resolved that the union be denied registration.

7. In addition to the foregoing the appellants further submitted that the respondent erred in law when she refused to register the union on ground of the objection raised and contended that the constitution of the new union was different from other unions which had neglected the informal sector otherwise called the *jua kali* sector.

8. In conclusion, the appellants submitted that the constitution of their intended union was specific to the sector to be represented and which is not covered by the Interested Parties' constitution. They further contended that the rule on membership in the objector's constitution is not specific and did not cover *Jua kali* sector. The appellants therefore urged that their new union should be registered because of the *jua kali* sector had been neglected by the other unions.

Respondent's case

9. The respondent submitted that section 14 (1) (d) (i) of the LRA allows a trade union to apply for registration only if there is no other union registered to sufficiently represent the whole or a substantial proportion of the interests in the sector. In that regard she submitted that the Basic metal works industry is sufficiently represented by the first and fourth interested parties herein and the KETAWU, Kenya Railway Workers Union(KRWU), and the Kenya Aviation and Allied workers union (KAAWU).

10. The respondent relied on the ILO definition of the basic metal products and the industries listed by the appellants in their appeal as the target for membership to urge that, the sector for which the proposed union was intended had already been adequately represented.

11. As regards the right to form, join or participate in union activities and programmes under Article 41 of the constitution, the respondent submitted that section 14 (1)(d)(i) of the LRA meets the test for limiting the said right set out by Article 24 of the constitution. Consequently, the respondent urged that there is justification to refuse registration of a trade union that is intended for a sector that is adequately represented. In this case the respondent submitted that the 1st interested party raised objection to the registration of the appellants' union and annexed copies of her constitutions which she considered and found that she sufficiently represented the employees in the sector. That before the rejection of the application for registration the respondent gave a fair hearing to the appellant through written correspondence.

Interested Parties' case

12. The interested parties submitted that the basic Metal Works industry is adequately represented by existing unions. That the appellants have failed to prove that they are employees in the sector as required by section 14 of the Act. In conclusion the interested party submitted that the registration of the new union will cause confusion in the industry where other unions already have signed recognition agreements and CBAs with various employers.

Analysis and Determination

13. There is no dispute that the appellants made a competent application for the registration of the intended trade union to represent employees in the basic metal works. There is further no dispute that other trade unions registered to represent employees in the industry have objected to the registration of the new union on ground that the sector is already sufficiently represented by them among other unions. The issues for determination are :

- a. **Whether the refusal to register the appellants' union was lawful and justified.**
- b. **Whether the reliefs sought should be granted.**

Refusal of register new union was lawful and justified

14. The respondent contended that the refusal to register was justified because there are other trade unions registered to represent workers in the sector. That she reached the said decision after receiving objection and copies of the constitutions from the already registered unions in the sector and after consulting with the National Labour Board. The sector in issue is Basic Metal Works. There several unions already registered to represent workers in the sector including the first and fourth interested Party herein, KAAWU, KETAWU and KRWU who are sufficiently representing all the categories of workers in the sector.

15. After considering the evidence and the submissions presented to the court, I find that the appellants have not proved on a balance of probability that the workers intended to be represented by the proposed union are not sufficiently represented by the said trade unions that are already registered in the sector. Article 41 (2)(c) of the constitution provides:

“Every worker has a right to form, join, or participate in the activities and programs of a trade union.”

16. The said right is however subject to the limitation established under Article 24 of the constitution which allows limitation of a right under the bill of rights through a law only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom and after taking into account several factors including the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others.

17. Section 14 of the LRA limits the said right under article 41 (2) (c) of the constitution without derogating from the spirit and letter of the freedom of association guaranteed by the said article 41 (2) (c). Section 14 (1)(d)(i) of the LRA provides that:

“A trade union may apply for registration if no other union already registered is in case of a trade union...of employees is sufficiently representative of the whole or of a substantial proportion of the interests in respect of which the applicants seek registration.”

18. The limitation set up by the foregoing provision is reasonable in a democratic society like ours and the refusal by the respondent to register the new union was justified because the Basic Metal Works sector is sufficiently represented by the said unions which are already registered to represent the sector. I agree with the respondent and the interested Parties that registration of the proposed union will create disharmony and unnecessary competition for members from the same sector. I therefore decline to reverse

the decision by the respondent to refuse registration of the proposed union.

19. The reason for the foregoing decision is that Rule 3 of the proposed union's constitution provides that membership will be drawn from all workers in the Basic Metal Industries; fabricated metal products; structural metal products and related metal and steel works which sector is already represented by the first and the fourth interested parties. The appellants are not being truthful when they contend in their appeal that the new union is only targeting the *jua kali* sector.

20. Basic Metal production according to the ILO definition, encompasses the activities of smelting or refining ferrous and precious as well as other non-ferrous metals from ore or scrap, using metallurgic techniques. It also comprises the production of metal alloys and super-alloys by adding certain chemical elements to pure metals. The products of the basic metal production include plates, sheet, strip, bars, rods, wires, tubes, pipes, and hollow profiles among other basic metal products. The appellants are therefore intending to rival other unions already registered in the industry and the court will not allow them just because they are citing the law selectively in their favour. Each person cannot be allowed to have his own union and cause disharmony in the industries so that the country can be seen as a champion of the freedom association.

Reliefs sought

21. In view of the finding herein above that the respondent acted fairly and within the law in refusing to register the proposed union, I decline to grant the reliefs sought by the appellants.

Disposition

22. For the reasons stated above, the appeal is dismissed with no orders as to costs.

Signed, dated and delivered this 13th day of January, 2017

ONESMUS MAKAU

JUDGE