



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
APPEAL NO. 11 OF 2015

- 1. NAHASON NDIAMAE**
- 2. JACKLYNE NEKESA NYONGESA**
- 3. MARK MATASI**
- 4. KIMSOP CHEPYEGON MATHEW**
- 5. BENSON SIMIYU**
- 6. EUNICE MASINDE**
- 7. INOCENT OUMA ONYANO**
- 8. JAMES OTIENO ALUKWE**
- 9. DAVID MASIBO**
- 10. AGNETA L. IMBAYARA**

APPELLANTS

All suing as the proposers of

THE KENYA UNION OF SECONDARY SCHOOLS NON-TEACHING STAFF

VERSUS

THE REGISTRAR OF TRADE UNIONSRESPONDENT

Mr. Enonda

M/s Oyugi for respondent

JUDGMENT

1. This is an appeal in terms of Section 30 of the Labour Relations Act, against the decision of the Registrar of Trade Unions to register the Kenya Union of Secondary Schools Non-Teaching Staff.
2. The refusal to register the proposed union was on the basis that there is already an existing registered trade union in the sector namely Kenya Union of Domestic Hotels, Educational Institutional, Hospitals

and Allied Workers (KUDHEIHA) which is sufficiently representative of the whole or substantial proportion of the interests in respect of which the appellants sought registration.

3. The Registrar also found that the employees the appellants seeks to recruit and represent are also represented by the Kenya Union of Employees of Polytechnics, College and Allied Institutions.

4. The Registrar of Trade Unions responded to the memorandum of appeal on 25th November 2015 stating that he is mandated under Section 31(3) of the Labour Institution Act and Section 19 of the Labour Relations Acts to make decision to register or not register a union upon consulting the National Labour Board which he did at a meeting held on 18th September 2014.

5. That the Registrar was at that meeting advised to refuse registration of the appellant on the aforesaid grounds.

6. That Section 14 of Labour Relations Act, bar registration of a trade union in a sector where there is an existing trade union representing the interests of the employees, the proposed union intend to recruit.

7. That the freedom of association the appellant is entitled to enjoy under Articles 41 (2) (c) and 36 (1) of the constitution of Kenya 2010 and under Section 4(1) (a) of the Labour Relations Act 2007, is limited by Section 24 (1) of the constitution.

8. That other unions raised objections to the registration of the new union so as to avoid union rivalry and industrial unrest in the sector which is already well covered by the two objecting unions.

9. That there are no justifiable grounds of appeal and the same be dismissed with costs.

Determination

10. The issue for determination is whether the decision to limit the right to freedom of association of the appellant is justifiable in the circumstances of the case?

11. Article 36 (1) of the constitution reads;

“36 (1) Every person has the right to freedom of association which includes the right to form, join or participate in the activities of an association of any kind.”

12. Whereas Article 41 reads:

“Every worker has the right-

(c) to form, join or participate in the activities and programmes of a trade union-;”

13. The right of the appellant under Articles 36 and 41 are limited under Article 24 of the Constitution as follows;

24. (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) 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; and

24. (2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—

(a) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and

(b) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

14. In the present case, the limitation of the freedom of association under Article 36 and 41 is by Section 14 (d) (i) of the Labour Relations Act No. 14 of 2007 which reads as follows;

14. A trade union may apply for registration if –

(d) no other trade union already registered is –

(i) In the case of a trade union of employers or of employees sufficiently representative of the whole or of a substantial proportion of the interests in respect of which the applicants seek registration;”

15. Including a proviso to this effect in Section 14 (2)

“14 (2) Notwithstanding the provisions of subsection (1) (d) the Registrar may register a trade union consisting of persons working in more than one section if the Registrar is satisfied that the constitution contains suitable provisions to protect and promote the respective sectorial interest of the employees;”

16. From the foregoing it is clear that the limitation to register a union in a sector where another union exists is not absolute. The Registrar upon considering the facts of the case and upon seeking and getting the advice of the National Labour Board may or may not register a union in a sector where there is in existence another union or other unions.

17. The test is whether the existing union is sufficiently representative of the whole or of a substantial proportion of interests.

18. In terms of Article 20 (3) of the constitution.

“(3) in applying a provision of the Bill of Rights a court

shall –

(b) Adopt the interpretation that most favours the enforcement of a right or fundamental freedom;”

19. In the present case, the Registrar of Trade Unions in denying the appellants a right and fundamental freedom under Article 36 and 41 of the constitution, must demonstrate compelling reasons supported by tangible evidence that the union(s) that object to the registration of a rival union sufficiently represent the whole or a substantial proportion of the interests of the sector in question, in this case, the secondary schools non-teaching staff.

20. The appeal record before court and in particular the affidavit sworn by the Registrar of Trade Unions does not begin to demonstrate how it arrived at the decision that the two rival unions represent all secondary schools non-teaching staff or a reasonable proportion of all secondary non-teaching staff in

Kenya.

21. The court takes judicial notice that there are thousands of secondary schools in near and far-flung areas of Kenya in which we have non-teaching staff mainly employed by the Board of Governors of the respective secondary schools and it is a tall order for one union to have presence in all these schools.

22. The court also takes judicial notice that there is not in existence uniform terms and conditions of non-teaching staff in all schools in Kenya consequently, there is a substantial gap of representation of non-teaching staff in secondary schools in Kenya so much so that the fear by the Registrar of Trade Unions that registration of a rival union representing non-teaching staff in secondary schools would result in intense rivalry and industrial unrest is farfetched.

23. The limitation therefore imposed by the Registrar on the right and fundamental freedom of the appellants to register and participate in the activities of a union to represent non-teaching staff in secondary schools in Kenya is not justifiable under Article 24 of the constitution.

24. The appeal has merit and the same is allowed. Consequently the court makes the following orders:

(a) The decision by the Registrar of Trade Unions to refuse to register The Kenya union of Secondary Schools Non-Teaching Staff is unlawful and unconstitutional and thus null and void and of no legal effect.

(b) The Registrar of Trade Unions is directed to register The Kenya Union of Secondary Schools Non-Teaching Staff by issuing a certificate of registration to the appellants within 30 days of this judgment.

Dated and Delivered at Nairobi this 19th day of May 2017

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE