



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

APPEAL NO. 9 OF 2016

PETERSON WACHIRA AND GEORGE GIBORE (SUING ON BEHALF OF THEMSELVES AND OF CLINICAL OFFICERS).....APPELLANTS

VERSUS

REGISTRAR OF TRADE UNIONS.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

AND

KENYA UNION OF DOMESTIC HOTELS, EDUCATIONAL INSTITUTIONS, HOSPITALS

AND ALLIED WORKERS (KUDHEIHA)1ST INTERESTED PARTY

UNION OF KENYA CIVIL SERVANTS.....2ND INTERESTED PARTY

Dr. Kamau Kuria for appellants

M/s Kinyua for 1st and 2nd respondent

Mr. Njagi for 1st interested party

Mr. Nyasimi for 2nd interested party

JUDGMENT

1. The appeal is against the decision of the Registrar of Trade Unions to refuse to register a trade union named Kenya Union of Clinical Officers (KUCU).

2. The appeal is based on grounds of appeal dated 6th May 2016 and amended on 13th January 2017. The appellants submit that the Registrar of Trade Unions erroneously and unlawfully stated that;

1. The interested parties represent adequately the interest of clinical officers.

2. That registration of the new union could dissect the medical sector and open a Pandora’s Box

whereby every cadre of officer in the medical sector would agitate for their own union leading to proliferation of unions in the various hospitals.

3. The National Labour Board did not approve the application for registration.

3. The following matters have not been placed in dispute:

1. The medical doctors and nurses have separate unions respectively.

2. That the clinical officers number approximately 17,000 country wide.

3. That the clinical officers operations are governed by the Clinical Officers' Training, Registration and Licensing Act, Cap 260 of the Laws of Kenya.

4. That almost all the clinical officers do not belong to any union by choice.

5. That the interested parties levy Agency Fees from the salaries of the clinical officers on the disputed basis that they represent the collective interests of the clinical officers.

Submissions by the Appellant

4. The appellant submit that the Registrar of Trade Unions did not have any basis to conclude that the interests of clinical officers were adequately covered and taken care of by the interested parties.

5. That the clinical officers had demonstrated adequately that they had specific attributes and needs that were not catered for at all by the interested parties who were jacks of all trade yet the interested parties continue to draw Agency Fees from the clinical officers.

6. That contrary to the assertion that registration of the new union would bring conflict to the medical sector, the constitution of the proposed union clearly shows that the clinical officers numbering about 17,000 have specific needs which are not been addressed by the interested parties hence there would be no conflict at all with the interested parties or with the union of medical doctors and that of the nurses.

7. That it was erroneous for the Registrar of Trade Unions to abdicate her authority to the National Labour Board, which she purports declined to approve the appellants' application for registration.

8. That the decision of the Registrar violated Article 36 and 41 of the Constitution on the freedom of association and the right to become a member and participate in activities of a union of one's choice.

9. That the Registrar wrongly based the decision to refuse registration on the provisions of Section 80 (2) (d) of the repealed Constitution on Kenya, instead of considering the provisions of the Constitution of Kenya 2010 and the relevant provisions of the Labour Relations Act, 2007 and in particular Section 14 thereof.

10. That any limitation on the appellant's right to enjoy freedom of association under Article 36 and right to form, join and participate in activities of a union of choice under Article 41 must be justifiable under Article 24 of the constitution otherwise such purported limitation is null and void *ab initio*.

11. The appellants urge the court to declare the decision of the Registrar of Trade Union unlawful, null and void and direct the Registrar to register the Appellant union. Appellant also seek vindicatory damages against the respondents.

Response

12. The respondents and the interested parties oppose the appeal.

13. Respondents rely on written submissions filed on 18th April 2017 whereas the interested parties rely on submissions filed on 17th March 2017 and 9th May respectively. The interested parties also filed replying affidavit in response to the memorandum of appeal.

14. The sum of the submissions by the respondent and the interested parties is as follows; *Section 31 (3) of the Labour Institutions Acts provides that;*

“The Registrar shall in exercise of his powers relating to registration and regulation of trade unions, act on the advice of the Board.”

15. That the Registrar used his discretion correctly upon advice by the National Labour Board to refuse registration of the union.

16. That the Registrar invited objections from the stakeholders in terms of Section 14 of the Labour Relations Act and received objections from the interested parties and consulted the National Labour Board and came to the conclusion that KUDHEIHA and KUCS (interested parties) are sufficiently representative of the clinical officers.

17. That Section 14 (9) (i) of the Labour Relations Act, gives power to the Registrar to decline to register a trade union if there is already a union that is sufficiently representative of the whole or of a substantial proportion of the interests in respect of which the applicants seek registration.

18. That this is a lawful safeguard against duplicity and unnecessary overlap. The respondent invited the court to look at the finding in **Aviation and Airport Services Workers Union –vs– Registrar of Trade Unions and another [2016] eKLR** while reversing the Registrar’s decision to register a second union in the aviation sector as follows;

“It is not far-fetched for the court to observe and rightly so that the sector has not enjoyed industrial peace due to the intense rivalry between the two unions and internal wrangles within each of the unions to the loss and detriment of the unionsable employees in the sector. Such are the matters that the National Labour Board is bound to consider and advice the Registrar upon before a new union is registered in a given sector.”

19. The respondent conclude that it would be wrong for the Registrar to register the new union in the medical sector where there exists other unions already representing the same interests as the appellants seek to represent as this would lead to duplication and trade union rivalries as the unions compete for membership leading to constant work disputes and confusion and the Registrar should not been seen to promote this.

20. The interested parties fully support the submissions by the respondent. The parties rely on various legal authorities in support of the competing views.

Determination

21. The issues for determination are as follows;

- a. Whether the respondent’s refusal to register the appellants union was lawful and justified;
- b. What reliefs if any the appellants are entitled to

22. In the matter of **Seth Panyako and 5 others –vs– Attorney General and 2 others [2013] eKLR**, this court while determining an appeal from the decision of the Registrar of Trade Unions declining to register The Kenya National Union of Nurses (KNUN) stated as follows;

“It is the court’s considered opinion that the provisions of Section 14(1) (d) (i) as read with Section 14 (2) of the Labour Relations Act, No. 14 of 2007 do not limit the constitutional right of workers

to form, join and participate in a union of their choice in that the provisions do not clearly and specifically limit the said right and do not clearly define the nature and extent of the limitation as required by Article 24 (2) (b) of the constitution

Another ambiguity in the provisions of Section 14 (2) is the use of words “sectoral interests”. Indeed Section 14 (1) (e) provides that subject to subsection (2) only members in a sector specified in the constitution qualify for membership of the trade union. In the context of the public service would the health service be described as a sector?

*The action by the Registrar is not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom! The court therefore, finds, that the refusal by the Registrar of Trade Unions to register the Kenya National Union of Nurses upon satisfying the requirements of Sections 12 and 18 of the Labour Relations Act, No. 14 of 2007 is contrary to Article 41 (2) (c) of the Bill of Rights as contained in the constitution of Kenya 2010 and the same is null and void **ab initio**.”*

23. The nurses’ case is almost on all fours with the clinical officers’ case and the finding of the court in the nurses’ case applies *mutatis mutandis* in this case. The Registrar of Trade Unions had no reasonable justification to refuse the registration of Kenya Union of Clinical Officers.

24. The objection to the appeal by the 1st interested party on the basis that the same is defective because it is titled ‘**amended appeal**’ instead of Memorandum of Appeal is a mere technicality within the meaning of Article 159 (2) (d) of the constitution and does not suffice to nullify the appeal under Section 30 of the Labour Relations Act, 2007.

25. This finding is not inconsistent with the decision in **Nicholas Kiptoo Arap Korir Salat and Independent Electoral and Boundaries Commission and 6 others [2013] eKLR** in which the court emphasized the need to abide by the rules of the court to enhance consistency and certainty in court proceedings. A slight deviation in the title of a suit document as decided above does not negate the essence of the document itself provided the content of the document speaks with sufficient clarity on the nature and intent of the document filed by a party, in this case, an appeal against a decision of the Registrar of Trade Unions.

26. This court finds in this particular matter as was the case in the Nurses’ case the decision made by the Registrar of Trade Unions in terms of Section 14 (d) (i) does not speak with sufficient factual clarity on the issue of sufficiency of representation and possibility of potential sectoral conflict, if the new union is registered as to constitute sufficient justification to limit fundamental freedom under Article 36 and a right under Article 41 of the Constitution of Kenya 2010. This does not rule out reasonable and justifiable application of Section 14 of the Labour Relations Act, in different case and circumstance as to constitute a reasonable justification in a democratic society.

27. To the extent the court has not declared Section 14 (d) (i) unconstitutional, application of the provision in each case must meet Article 24 of the Constitution of Kenya test, which in this matter is not the case. The case of **Murr Maboud and 6 others –vs– Registrar of Trade unions and another [2012] eKLR** is instructive that the respondent is bound to comply with the statutory law as moderated by constitutional provisions and in particular Article 24.

28. The court makes the following final orders;

1. The appeal is allowed with costs to follow the outcome.
2. The decision by the Registrar of Trade Unions by a letter dated 19th April 2016 declining registration of Kenya Union of Clinical Officers is declared unlawful, null and void.
3. The court directs the Registrar of Trade Unions to register the Kenya Union of Clinical Officers forthwith.

29. The prayer for vindictory damages is declined.

Dated and Delivered at Nairobi this 30th day of June 2017

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE