



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
APPEAL NO. 7 OF 2016

(Before Hon. Lady Justice Hellen S. Wasilwa on 19th September 2017)

CHARLES OSICHO

PETER NGUMA MATHEKA} APPLICANTS

**(FOR AND ON BEHALF OF THE PROPOSED KENYA UNION OF
ROAD CONTRACTORS AND CIVIL ENGINEERING WORKERS)**

VERSUS

REGISTRAR OF TRADE UNIONS.....RESPONDENT

AND

KENYA BUILDING, CONSTRUCTION, TIMBER AND FURNITURE INDUSTRIES

EMPLOYEES UNIONINTENDED INTERESTED PARTY

JUDGMENT

1. The Notice of Motion and Appeal before the Court are dated 20.4.2016 brought pursuant to Section 30 of the Labour Relations Act. In the Motion before the Court the Appellant seeks for prayers that the Respondent be ordered to issue the Promoters with the certificate of establishment of a trade union to enable the Appellant to carry out recruitment of members.

2. Further, that the Respondent’s letter dated 21.3.2016 declining the promoters certificate contemplated under Section 12(1) of the Labour Relations Act, 2007, be declared unconstitutional.

3. The Application is supported by the grounds:

1. That the Respondent’s action of declining to issue certificate denying the Appellant the right to organize workers is not supported by the provisions of Section 12 of the Labour Relations Act No. 14 of 2007.

2. That the grounds given by the Respondent for declining the Appellant’s application that “Kenya Building, Construction, Timber Industries Employees Union” is the trade union

representing the interest of employees within the sector of the proposed trade union intended to recruit from is not among the grounds envisaged under Section 12(3) (a) and (b) for refusal.

3. That the Respondent grounds for refusal to issue the certificate would only be applicable where and when Section 12 and 13 have been duly complied with by the Respondent.

4. That the Respondent erred in law and made unlawful, illegal and unconstitutional decisions by their letter dated 21.3.2016 without due regard to Article 41(2) (c) of the Constitution of Kenya.

4. The motion is not supported by an affidavit.

5. The Appeal relates to the refusal by the Registrar of Trade Union to issue a Certificate of Establishment of a Trade Union communicated to them by the Respondent's letter of 21.3.2016. The Appeal is based on the grounds:

i. That the Appellant is the 1st promoter of the proposed "Kenya Union of Road Contractors and Civil Engineering Workers" whose objective is to recruit for the purpose of establishing a Trade Union to represent interests of employees in the Road Construction and Civil Engineering Industry.

ii. The Appellant pursuant to Section 12(1) of the Labour Relations Act No. 14 of 2007 submitted an application dated 29.1.2016 for issuance of a certificate to enable the Appellant carry out recruitment of interested employees within the specified sector for purposes of establishing a Trade Union.

iii. That the letter aforesaid conformed to the conditions set out in Section 12(2) (a) and (b) of the Labour Relations Act No 14 of 2007.

iv. That on 10.2.2016, the Respondent wrote to the Appellant to shed more light on the scope of the proposed "Kenya Union of Road Contractors and Civil Engineering Workers" as opposed to "Kenya Engineering Workers Union."

v. That the Appellant vide a letter dated 17.2.2016, replied to the Respondent's letter of 10.2.2016 and gave a comprehensive overview and scope of the proposed "Kenya Union of Road Contractors and Civil Engineering Workers."

vi. That on 12.3.2016, the Appellant's Application was declined by the Respondent vide their letter of the same date, on the ground that, the areas the Appellant intended to recruit from were already represented by the Kenya Building Construction, Timber and Furniture Industries Employees Union.

vii. That the Appellant wish to state that, while their Application was under consideration by the Respondent, they were asked to explain the sector they were targeting since Kenya Engineering Workers Union already covered the areas they were targeting which they obliged and gave a comprehensive and clear explanation yet on declining the Respondent gave her grounds for doing so.

viii. That the Appellants state that they were not given an opportunity to explain and shed light on the distinction between the scope of their proposed union and Kenya Building Construction Timber and Furniture Industries Employees Union which is against the rules of natural justice and his constitutional rights of fair administrative action.

ix. That the Appellant states that the Respondent's actions of declining their application and thereby denying them the right to organize workers is not supported by the provisions of Section 12 of the Labour Relations Act No. 14 of 2007.

x. That it behoves the Respondent to issue a certificate of recruitment within 30 days from the date of receipt of the application once the conditions set out under Section 12(2) (a) and (b) of the Labour Relations Act are fulfilled.

xi. That the grounds for refusal of an application under Section 12 are clearly set out at Section 12(3) (a) and (b) which does not include the grounds cited by the Respondent.

xii. That the grounds given by the Respondent for declining the Appellant's application that Kenya Building Construction, Timber and Furniture Industries Employees Union is the trade union representing interests of the employees within the sector that the proposed trade union intends to recruit from is not among the grounds envisaged under Section 12(3) (a) and (b) for refusal of a certificate to recruit.

xiii. That the Respondent reserves the right to withdraw such certificate under Section 12 (5) for reasons stated therein, hence she had no cogent reason to refuse the Appellant's application.

xiv. That the refusal by the Respondent amounted to violation of the employees freedom of association in accordance with Article 36 of the Constitution of Kenya 2010 and the right of every worker to form, join or participate in the activities and programmes of trade unions as clearly set out in Article 41(a)(c).

6. The Appellants pray for the Respondent's letter dated 21.3.2016 to be declared unlawful and unconstitutional, the decision of the Respondent to be declared ultra vires of Section 12 of the Labour Relations Act No. 14 of 2007 and that the Respondent be directed to issue the Appellant with a certificate of establishment of a trade union.

7. In Response to the Application and Appeal the Respondent filed a Replying affidavit stating that she is barred by the provisions of Section 14 of the Labour Relations Act from registering a trade union where there is an existing trade union representing the interests of the employees the proposed union intends to recruit.

8. She states that the scope of representation by the Appellants is already covered by an existing trade union the Kenya Building and Construction, Timber and Furniture Industries Employees Union.

9. Further that the enjoyment of the freedom of association by the Appellants as enshrined in the Constitution of Kenya 2010 under the Bill of Rights is limited to the extent that their enjoyment shall not be prejudicial to other parties' rights.

10. The Respondent avers that she is expected to exercise due diligence in the performance of her duties and must therefore, ensure that her actions support harmonious cooperation between employer's trade unions and employees and must therefore, read Section 12 of the Labour Relations Act together with other relevant sections in the Act, Section 12 should not be read in isolation. It should be read together with Section 14.

11. She also states that the Appellant's intended membership has a Trade Union to join and there is no evidence that the Appellants tried to join and were refused entry.

12. The Respondent is of the view that a recruitment certificate is bound to create trade union rivalries or confusion to the workers and employees as to which is the rightful union to join or deal with resulting in unhealthy Labour Relations. She prays for the Appeal to be dismissed with costs.

13. The Interested Party was allowed in to the proceedings by order of the court of 30.5.2016. They filed a Replying Affidavit in opposition of the Appeal and Notice of Motion dated 20.4.2016 wherein the deponent one Francis K. Murage states that the 1st Appellant has been the Branch Secretary of the Interested Party Union for the last 10 years until 23.1.2016 when he was voted out by the Union members and they therefore believe that the Appellant is a disgruntled loser out to created anarchy and confusion in

the industry.

14. They further state that the proposed union scope is similar as the existing interested party and this will cause confusion and mislead workers. It is the Interested Party's contention that the Road contractors and Civil Engineering sub sectors are adequately represented by the interested party and registration of the Applicant union is meant to undermine and scuttle the operation of the Interested Party Union.

15. Further that there exists the roads and Civil Engineering Contractors Association of Kenya (RACECA) whom they have a Collective Bargaining agreement with through the Federation of Kenya Employers in addition to other CBAs with other road contractors who are not members of RACECA.

16. They contend that the refusal to register the proposed union by the Respondent was in line with the law and the Constitution and urge the Court to dismiss the Appeal.

17. In Response to the Interested Party's Replying Affidavit, the Appellant filed a further affidavit on 24.10.2016, stating that the Labour Relations Act allows a person to form a Trade Union on the basis of Industry and Sector and there would be no duplicity as the proposed Union seeks to address the needs of a different industry from those represented by the Interested Party. That Section 14(d) of the Constitution is inconsistent with Article 2(1) and (4) of the Constitution and the same should be declared invalid.

18. They state that they are only seeking a certificate under Section 12 of the Labour Relations Act which the Respondent has no basis to deny and failing to issue one is in contravention of Article 36(2) as there is a fundamental difference between the sector of the Interested Party and that of the Appellants.

19. They state that failure to register the intended union will be prejudicial to the employees working for road contractors and engineers in Kenya as they will lack representation.

20. Further that the reasons advanced by the Respondent for failing to register should have been advanced upon establishment of the Union the Respondent and having had the opportunity to look at the constitutions of both the Interested Party and the Appellants.

21. They contend that the Registrar is empowered under Section 14(2) of the Labour Relations Act to register another union if the constitution contains suitable provisions to protect and promote the respective sectoral interests of employees.

22. That any alleged recognition agreements and CBAs between the interested party and other Roads and Civil Engineering Contractors Associations have not been produced before the Court and their existence is doubted.

23. They further state that the sector is continually growing with the emergence of counties and as new employees are unrepresented and there is a specialized union for employees working in the construction industry.

24. It is the Appellants position that the 1965 Government Policy on Trade Union Organization in Kenya providing for amalgamation of trade unions to create fewer and stronger unions is outdated and not in sync with the sector's developments.

25. They state that there will be no conflict between the two unions as a demarcation is well advised and the Interested Party will suffer no prejudice if the application is allowed.

Submissions

26. The Appellant submits that the registrar is in contravention of Section 12(1) of the Labour Relations Act as the reasons advanced are not in line with law. They rely on the case of **Nickson Munyu Mburu & 6 others vs. Registrar of Trade Unions & Another (2015) eKLR** wherein it was stated that a certificate under Section 12(1) of the Labour Relations Act, 2007, is not the same as a Certificate of

Registration issued under section 19(1) (a) and as such there is no other consideration on the part of the Registrar of Trade Unions in issuing of certificate under Section 12(1), beyond these considerations contained in section 12(3).

27. They also submit that the objection by the Interested Party is premature as they did not prove the establishment of the rival union would lead to confusion in the industry.

28. It is the Appellants position that the failure by the Respondent to issue a certificate of recruitment is in contravention with Article 36 and 41 of the Constitution. They cite the case of **Scientific Research International Technical & Allied Workers Union vs. Kenya Agricultural Research Institute (2013) eKLR** where it was held that:

“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 and is co-joined to the right to dissociate: just as much 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 one trade union.”

29. The Appellant further submits that a certificate of recruitment should be issued by the Respondent as no justifiable reason of not doing so has been advanced. They cite the case of **David Benedict Omulama & 8 others Vs the Registrar of Trade Unions & Another (2014) eKLR** where it was stated:

“This Court appreciates that in a developing country with a dynamic and growing economy, there is growth not only of investors but also of employees to attend to this dynamic economy and its needs. Many employees in the emerging sectors are not represented so as to enrich the new emerging sectors to enable them have bargaining units and viable organizational structures that go to the employee at the shop floor. This is a reality that the law has largely not addressed and by not doing so the benchmarks are too low as they are the same as for general agriculture and thus by having this single focus, the worker in the floriculture and horticulture industries will have their realities addressed without driving the floriculture and horticulture investors out of business. The settling of new benchmarks for the floriculture and horticulture industry would not be in any way interfering with what is already applicable for the plantations and agricultural sector, quite to the contrary, there would be more enrichment to these sectors and thee workers represented therein would have a more fuller representation.”

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

31. The Respondent in submissions states that she is duty bound to refuse registration as in here opinion the sector was already represented elsewhere in line with section 14(1)(d) of the Labour Relations Act. Further that she acted in public interest in refusing to grant a certificate of recruitment. She cites the case of **Kenya Guards & Allied Workers Union Vs Security Guards Services and 38 others and Another Vs Security Guard Services and 38 Others and Another (IP) H. C. Misc 1159 of 2003** where it was held:-

“Where national or public interest is denied the gates of hell open wide to give way to deforestation, pollution, environmental degradation, poverty, insecurity and instability. At the end of the day, we must remember those famous words of a famous jurist-justice is not a cloistered virtue. I must add that where justice is done and public interest upheld, it is acknowledged by the public at large, the sons and daughters of the land dance and sing, and the angels of heaven sing and dance and Heaven and Earth embrace. By upholding public interest and treating it as twinned to the human rights we shall be able to do away with poverty eradication programmes and instead we shall have empowered our people to create real wealth for themselves. Public interest must be the engine of the millennium and it must where relevant

occupy center stage in the Courts...”

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

33. The Interested Party are in line with the Replying Affidavit and cite the case of **Kenya Revenue Authority Employees Union Vs The Registrar of Trade Unions Appeal No. 15 of 2014** where the Principal Judge dismissed the Appeal against the Registrar of Trade Unions’ decision to deny registration of a new union on the ground that there was in existence another Union in the sector that sufficiently represented the Employees in the said sector.

34. They pray for the Appeal to be dismissed.

35. Section 12 of the Labour Relations Act states as follows:

“Establishing a trade union or employers’ organization

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.

36. As indicated above, before the Registrar allows an application for the Certificate to recruit, she must ensure that the application is not defective and that the names of the trade union and employers organization is not the same as the existing trade union or employer’s organization or in not sufficiently

similar so as to mislead or cause confusion.

37. The Registrar Trade Union is expected to issue such a Certificate within 30 days of the receipt of the application.

38. The Applicants herein made their application for recruitment of member to the Registrar Trade Union vide a letter dated 29.1.2016. The name given for the proposed union was stated as “The Kenya Union of Road Contractors and Civil Engineering Workers”.

39. On 10.2.2016, the Registrar of Trade Union replied as follow:-

“In reference to your application dated 29.1.2016, please explain the Sector you are targeting because the Kenya Engineering Workers Union already covers employees engaged in the General Mechanical engineering and Metal Manufacturing Industries”.

40. The Applicants replied to the Registrar Trade Union’s letter on 17.2.2016 giving parameters of the work they intended to cover.

41. On 21.3.2016, their application was rejected by the Registrar Trade Union and in her letter states as follows:-

“Reference is made to your response dated 17th February, 2016 contents where whereof are noted.

However, I further wish to inform you that the Kenya Building Construction, Timber and Furniture Industries Employees Union (KBCTFIEU) represents employees engaged in Building Construction and Civil Engineering Industry, all activities covering and including Structural Engineering, Maintenance, Repairs and Demolitions of both Building or Airfields, all Consulting Engineering activities, all Architectural or Design activities, all Surveying activities, Plumbing works and installation, road making and maintenance, Pre-cast Concrete Manufacturing and Casting Trades, Water Works and other related activities.

Arising from the above, you will note that all the activities you are targeting in this Sector are therefore sufficiently represented. The Labour Relations Act allows for recruitment of members in a proposed Trade Union for only those sectors where no other Union exists.

Consequently therefore, I regret to inform you that your application fails to qualify as it has almost identical objectives to those of Kenya Building, construction, Timber and Furniture Industries Employees Union (KBCTFIEU).

Signed

L. N. GICHEHA (MRS)

REGISTRAR OF TRADE UNIONS “

42. The above letter fails to address itself to the parameters set out in Section 12 (3) Labour Relations Act. Section 12 (3) deals with issue of the name and defectiveness of the application.

43. The issues of another union with similar objectives does not come in at this state of recruitment. Rejecting the application of the Applicants to recruit members for purposes of registration is denying them their labour rights as envisaged under Article 41 of the Kenyan Constitution.

44. The Interested Party raised similar issues which touch on registration of a trade union and this is not in any way related to the issue of recruitment for purposes of registration.

45. I dealt with similar issues in **ELRC Appeal No. 12 of 2016, Barnabas Lagat & Another vs Registrar Trade Union and Others** and indicated that the actions of the Registrar Trade Union were premature and based on issues of registration of a trade union and not on issues of recruitment for members of an Intended Union.

46. This is the same position in the instant case. Based on the provisions of the law cited and also case law, I find the action of the Registrar Trade Union in denying the Applicants their request to recruit members for purposes of registering a Union unjustifiable. I declare that decision null and void and allow the Appeal.
I direct that the Applicants be issued with the Certificate as prayed within 14 days from the date of this Judgement.

47. Costs to the Applicants.

Read in open Court this **19th day of September, 2017.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

1st Applicant – Charles Osicho – Present

No appearance for other parties