



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 98 OF 2015

**IN THE MATTER OF ENFORCEMENT OF BILL OF RIGHTS ARTICLE 22 OF THE
CONSTITUTION OF KENYA, 2010**

KENYA UNION OF EMPLOYEES OF VOLUNTARY AND CHARITABLE

ORGANIZATIONS (KUEVACO).....1ST PETITIONER

ODIN BOAZ OTIENO (Janitor).....2ND PETITIONER

-VERSUS-

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

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

JUDGMENT

1. The petition was filed on 14th December 2015 seeking a declaration that:-

(i.) The Registrar of trade unions has no authority under Section 43 (5) (a) of the Labour Relations Act, 2007 to suspend or cancel registration of any trade union or any employers' organization for failure to file annual returns.

(ii.) Declaration that sections 28 (1) and (2) of the Labour Relations Act, contravenes Article 36 (3) (a) and 41 (4) of the constitution of Kenya 2010 and is null and void to the extent of the inconsistency.

(iii.) The court to invalidate the notice to suspend registration of the 1st petitioner dated 14th February 2015 for being unlawful.

2. The petition is based on grounds that the court summarises as follows:-

3. The petitioner submits that section 43 of the Act, does not authorize the Registrar to either suspend or cancel registration of a trade union.

4. That the wrong form was used by the Registrar in issuing the notice in that, the form used was for purposes of section 28 of the Act, and not section 43, as alleged by the registrar.

5. The 2nd petitioner admits that he had not filed annual returns as alleged by the registrar but had a good reason for the omission.

Facts

6. On 14th September 2015, the Registrar of trade unions issued a three (3) months' notice of intention to suspend Registration of the 1st petitioner, Kenya Union of Employees of Voluntary and Charitable Organizations (KUEVACO) for failure to file returns in terms of section 43 of the Labour Relations Act, 2007.

7. The Registrar warned the petitioners that failure to file Annual Returns is an offence under section 43 (5) of the Act and faulted the justification for not doing so to wit, that the 2nd petitioner suffers disability of eyesight and could not personally, prepare and file accurate annual returns. That the 2nd petitioner had to rely on other persons to prepare the same, hence the delay.

8. That, the registrar ought to avail the petitioner's humble time to prepare and file returns instead of threatening the petitioners with suspension and (or deregistration of the union).

9. The petitioners pray that the court grants the petition as prayed.

Response

10. The respondents filed grounds of opposition on 21st January 2016 as follows;-

(i.) That the application lacks merit and is an abuse of the court process.

(ii.) That the law cannot exempt one from complying with statutory rules.

(iii.) That the law has not given exceptions to certain individuals.

(iv.) That the court's jurisdiction is limited to what the law provides.

(v.) That the petition is frivolous to the extent that it purports to seek for orders stopping a public officer from executing a constitutional mandate.

(vi.) That the orders sought ought not issue as the claimants are using this application and indeed the entire suit to pull the wool over the court's eyes.

(vii.) That the orders sought ought not issue as the claimant's application is frivolous, vexatious and an abuse of the due process of this Honourable court and should therefore be dismissed with costs.

(viii.) That the grounds set out in support of the petition do not raise any constitutional issue either for enforcement of fundamental rights or interpretation of the constitution.

Determination

11. The issues for determination are as follows:-

(i.) Whether or not the Registrar of trade unions notice to the petitioners was lawful.

(ii.) If the answer to (i) above is in the affirmative, whether the registrar exercised the mandate given to the office and in terms of a fair procedure.

(iii.) What remedy if any, is suitable in the circumstances of the case?

Issue (i)

12. Section 28 of the Labour Relations Act, 2007 provides:-

1. “Registrar shall cancel or suspend the registration of a trade union, employers’ organization or federation if –

a) The trade union, employers’ organization or federation is dissolved; or

b) The Registrar is satisfied that the trade union employers’ organization or federation has ceased to exist.

2. The Registrar may cancel or suspend the registration of a trade union, employers’ organization or federation if the registrar is satisfied that the trade union, employers’ organization or federation

–

a) was registered as a result of fraud, misrepresentation or mistake;

b) is operating in contravention of this Act

c) being used for an unlawful purpose;

d) has failed to conduct elections in accordance with the requirements of this Act; or

e) is not independent

3. The Registrar shall not cancel or suspend registration of a trade union employers’ organization or federation under subsection (2) unless the Registrar has

a) given the trade union, employers’ organization or federation at least two months’ notice of his intention to suspend or cancel its registration in Form I set out in the second schedule; and

b) considered any representation made by the trade union, employers’ organization or federation within the two months period.”

13. It is common cause that the registration of the 1st petitioner has not been suspended or cancelled. The petitioners moved to the court upon receipt of the notice for an injunction pending the hearing and determination of the suit.

14. Notwithstanding that interim orders were not granted, the Registrar has not moved in terms of the said notice.

15. The notice issued by the Registrar to suspend or cancel the registration of the 1st petitioner was for alleged failure by the Trade Union to file annual returns for the year 1998 – 2014, contrary to the provisions of Section 43 of the Labour Relations Act.

16. Section 43 provides:

(1) The authorized representative of a registered trade union, employers’ organization, or federation shall furnish annually by a prescribed date to the Registrar a general statement of all receipts and expenditure during the year ending 31st December of the preceding year including -

a) all sums of money received by way of donations or grants from any local or overseas sources;

b) a list of assistance received from any sources; and

c) a list of the assets and liability of trade union as at 31st December.

(2) The statement specified under subsection (1) shall be accompanied by a copy of the auditor's report and shall be prepared in such form and contain such particulars as may be prescribed.

(3) The authorized representative referred to in subsection – (1) shall simultaneously furnish to the Registrar –

a) an inventory of the trade union or organization's assets;

b) a copy of the rules in force, including all alterations and amendments to the rules, and of all new rules; and

c) a list of all changes of officials during the preceding year.

(4)

(5) An authorized representative of any trade union or employer's organization who –

a) fails to comply with any of the requirements of this section;

b) wilfully, makes or orders, cancels or procures to be made a false entry in or omission from a general statement, copy or list delivered to the Registrar in terms of this section,

c) commits an offence”

17. The preamble to the Labour Relations Act, 2007 provides inter alia;

“an Act of parliament to consolidate the law relating to trade unions and trade disputes to provide for the registration, regulation, management and democratization of trade unions.” (emphasis mine).

18. The officer mandated to register and regulate trade unions is the Registrar of trade unions.

19. From the correspondence between the office of the Registrar of Trade Unions and the petitioners produced by the petitioners, it is apparent that the petitioners have failed and / or neglected to file annual returns from as far back as 1998.

20. The petitioners have continuously justified the non-compliance with the provisions of Section 28 of the Act, with the fact that the 2nd petitioner suffers from sight disability.

21. The petitioners have continuously prayed to be given more time to comply but instead of doing so, would rush to court to injunct the Registrar from carrying out her mandate.

22. The office of the Registrar has equally neglected its duty to commence criminal proceedings against the petitioners for violating section 43 of the Act. Both parties in this matter lack clean hands.

23. On 4th June, 2013, the Registrar issued what she referred to as ‘final reminder’ to request the petitioners to furnish all returns by or within end of July 2015. This apparently led to the present litigation.

24. Form ‘N’ is issued by the Registrar in terms of Section 28 notifying the intention to suspend or cancel registration of a union. It is lawful for the Registrar to issue such a notice for reasons provided under

Section 28 of the Act. These reasons include as noted earlier where a trade union '*is operating in contravention of this Act.*'

25. It is without a doubt that the petitioners have continued to operate in blatant disregard and contravention of Section 43 of the Act.

26. Unions are run by many officials and committees and it is untenable that disability of one official becomes the basis of blatant disregard of the law.

27. The court is satisfied that the provisions of section 28 and 43 are for proper regulation, management and democratization of trade unions. Officials of the unions must be accountable to their members, and must at all times observe the law of the land.

28. These provisions do not derogate from the freedom of association and the right to a trade union provided under Articles 36 and 41 of the Constitution of Kenya 2010.

29. The provisions of Sections 28 and 43 provide lawful limitation to the provisions of Articles 36 and 41. The need for the Registrar to regulate unions in accordance with the Act, is reasonable and justifiable in an open and democratic society like Kenya as provided in Article 24 of the Constitution.

30. Clearly, the petition is misconceived and an abuse of court process as it is meant to urge the court to shield the petitioners from observing the law. This court is not amenable to such invitation.

31. Accordingly, the petition lacks merit and is dismissed with no order as to costs.

Dated, signed and delivered at Nairobi this 17th November 2017

MATHEWS NDERI NDUMA

JUDGE