



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF

KENYA AT NAIROBI

APPEAL NO 14 OF 2014

PETROS WANGANGI KALII

DAVID KIPTOO KURGAT

JOEL CHERUIYOT LIMO

ENOCK MUKHWANA WASIKE

CHARLES IRERI JOSEPH

JAMES ANYEMBE ACHOKA

CHRISANTOUS ONCHONG'A SIRIMANI

(APPLICANTS AND PROMOTERS OF THE PROPOSED

KENYA ELECTRICITY UTILITIES WORKERS UNION).....APPELLANTS

AND

REGISTRAR OF TRADE UNIONS.....RESPONDENT

JUDGEMENT

1. The appellants herein are the promoters of a proposed Trade Union by the name Kenya Electricity Utilities Workers Union (KEUWU). The appeal arises from the decision of the Registrar of Trade Unions refusing to register the union communicated vide a letter dated 26th September, 2014. The appeal was based on the following grounds:

a. The appellants herein as applicant and promoters of the proposed Kenya Electricity Utilities Workers Union made an application to the Registrar of Trade Unions in accordance with Section 12(1) of the Labour Relations Act, for a Certificate to recruit members and to undertake lawful activities for the purpose of establishing a trade union. The appellants' application which is dated 18th March, 2014, asserted that membership for the proposed union would only be drawn from "public utilities dealing with generation, transmission and distribution of electricity"

b. The Registrar of Trade Unions, in a letter dated 24th March, 2014 requested the Appellants to tender an explanation in 'clear and unequivocal terms' where membership of the proposed union

was going to be drawn from, adding that the term 'Public utilities' was too general and ambiguous. The Registrar in the same letter informed the Appellants that their intended sector of coverage was already covered by the other union, the Kenya Electrical Traders and Allied Workers Union (KETAWU).

c. By a letter dated 10th april, 2014 the Appellants asserted inter alia:

That they only sought to draw their membership from electricity utilities, which are wholly state owned or the ones that are partially privatized. The Appellants' target electricity utilities are: Kenya Power and Lightning Company (KPLC), Kenya Energy Generation Company (KENGEN), Kenya Electricity Transmission Company (KETRACO), Geothermal Development Company (GDC) and Rural Electricity Authority (REA).

That as per the Appellants' application, the Appellants sought to have an 'Electricity Utilities Workers Union' unlike Kenya Electrical Trades and Allied workers Union (KETAWU) which is an 'Electrical Trades and Allied Works Union'. And that though the two vehicles may appear related, the Appellants' proposed union is affiliated to workers in the industry of electricity: a form of energy from charged particles usually supplied through cables and wires, whereas Kenya Electrical Traders and Allied Workers Union (KETAWU) is affiliated to workers in the electrical industry, where electrical refers to 'that which is connected with electricity, uses electricity or produces electricity.

That registration of the proposed union Kenya Utilities Electricity Workers Union (KEUWU) Would not amount to duplication of functions, as the proposed union sought to represent only those areas which, although the existing union theoretically extends its scope of representation to, the same areas are not practically covered by the existing union.

d. *That upon demonstrating in 'clear and unequivocal terms' the scope of is representation, and that their registration would not amount to a duplication of functions contra section 14 (1) (d) of the Labour Relations Act to the satisfaction of the Registrar of Trade Unions, the Appellants were issued with a certificate to Recruit dated 17th April, 2014 in accordance with Section 12 of the Labour Relations Act.*

e. *In a letter dated 24th June 2014, the Registrar of Trade Unions informed the Appellants that an objection had been raised to their certificate to Recruit.*

f. *Further, the Registrar of Trade Unions attached to her letter a copy of the letter of objection made by Kenya Electrical Traders and Allied Workers Union (KETAWU) dated 12th June, 2014 and referenced "unlawful registration and recruitment of members by Kenya electricity workers union:.*

g. *The Registrar of Trade Unions wrote to the Appellants a letter dated 24th June, 2014 inviting their response to the allegations that had been raised against them by the objector, Kenya Electrical Traders and Allied workers Union (KETAWU) and especially the allegation contained in paragraph 12 of the letter of objection to the effect that the proposed union had sought to obtain recognition agreements in areas where currently the Kenya Electrical Traders and Allied Workers Union (KETAWU) is seeking to be recognized.*

h. *The proposed union (KEUWU), in its letter dated 4th July, 2014 responded to each allegation put against them by Kenya Electrical Traders and Allied Workers Union (KETAWU). The proposed union was categorical that is promoters or interim officials had not engaged in the practice of full unionism in any way and had not sought recognition agreements with any employer.*

i. *The Registrar of Trade Unions, being persuaded by the clarification tendered by the proposed*

union, gazette the application of the proposed union (KEUWU) under Gazette No. 5034.

j. In a letter dated 26th September, 2014 and addressed to the Interim Secretary of the proposed union (KEUWU), forwarding a Notification of Refusal Registration, the Registrar of Trade Unions informed the Appellants that their application of registration of trade union had been rejected.

2. In their submission in support of the appeal, the appellants contended that the Registrar failed to consider that the provisions of the constitution of the proposed union stipulated that membership would be open to all persons engaged or employed by electricity utility companies currently in operation in the country and which are concerned with generation, transmission and distribution of electricity namely Kenya Electricity Transmission Company, Geothermal Development Corporation and Rural Electrification Authority.

3. According to the appellant the existing Kenya Electrical Trades & Allied Workers Union (KETAWU) does not have recognition with any of the public utility companies fully state owned and he owned and he's not negotiated any CBA with the employers in the sector. This was evidently lack of representations of workers in this sector. The appellants further contended that the proposed union's coverage does not duplicate that of KETAWU since the union would only target and draw membership from electricity utility companies and would be affiliated to workers in the industry of electricity, a form of energy from charged particles usually supplied through cables and wires. These according to the appellants are members who are engaged in the sector of generation, production and supply of electricity. On the other hand KETAWU drew its membership from electrical industry where electrical referred to that which is connected to electricity, uses electricity or produces electricity. The proposed union according to the appellants targeted members who are workers in the industry of production and use of electrical devices.

4. The appellants further submitted that the proposed union would not amount to duplication of functions as the union only sought to represent areas which although the existing union theoretically extends to, the same areas are not practically covered by the existing union.

5. The respondent on its part submitted that under section 31(3) of the Labour Institutions Act the Registrar of Trade Unions exercises his powers relating to the registration and regulation of trade unions on the advice of the National Labour Board. The section according to Ms Oyugi demonstrates that as much as the Registrar has power to register and regulate the actions of trade unions, the powers are limited to a certain extent and whenever advice has been given by the Board, the Registrar has no otherwise but to adhere to the instruction and advice given.

6. Counsel further submitted that in this particular case the application was presented to the National Labour Board investigations done and relevant documents scrutinized and the Board made a conclusion that the appellant did not qualify to be registered since the section of coverage sought by the appellant was already represented by KETAWU.

7. Counsel denied that the appellants rights under article 41 of the constitution had been violated since in the case of **Aviation & Transport Workers Services Union Vs Registrar of Trade Unions and Another [2016] eKLR** the court held that article 41 of the constitution was not absolute and that article 24 allows limitations by law of fundamental freedoms to the extent that such limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all the relevant factors. Section 14 of the Labour Institutions Act therefore satisfied the requirement of article 24 on limitation.

8. Ms Oyugi therefore submitted that there was justification in the refusal to register a trade union which was intended for a sector that was adequately represented. Counsel further submitted that it was imperative that unlawful proliferation in trade union registration over the same unionisable employees would eventually lead to absurdity in representation and abuse of the rights of already registered trade unions.

9. Mr Onyony for the Interested party reiterated most of the submissions by the respondent and added that

the appellant sought to draw membership from the same sector employees where the interested party has members and where it is in the process of obtaining recognition agreements. Counsel further submitted that the appellant does recognize the fact that the interested party's constitution does cover all the areas it seeks to represent.

10. On the allegations of lack of effective representation, counsel submitted that this was a hollow statement since all members of the Interested Party were effectively participating in the activities of their union of choice and the fact that a CBA is not yet concluded did not translate to non-representation.

11. The right to form or join a trade union of one's choice is recognized and protected both in the Kenya constitution and International law.

12. Article 41 of the Constitution gives every person the right to fair labour practices which include the right to form, join or participate in the activities and programmes of a trade union. Further the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87) (ILO) sets forth the right for workers and employers to establish and join organizations of their own choosing without previous authorization.

13. The right to form a trade union is therefore a fundamental right and freedom recognized under the Bill of Rights in our constitution and under international law. This right is however not absolute. Article 24(1) permits limitation of a right or fundamental freedom 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 the nature of the right or fundamental freedom, the importance of the purpose of the limitation and the nature and extent of the limitation.

14. Section 20 of the Labour Relations Act empowers the Registrar to refuse registration of a trade union if satisfied that it does not meet the requirements for registration. Section 14 (1) of the Act makes as a requirement before registration that promoters of a proposed trade union must demonstrate that no other trade union already registered is sufficiently representative of the whole or of a substantial proportion of the interest for which they seek registration.

15. The appellant in its application for registration targeted Kenya Power & Lightning Company, Kenya Energy Generation Company, Kenya Electricity Transmission Company, Geothermal Development Company and Rural Electricity Authority. The appellants contended that the proposed unions sector coverage does not duplicate that of Kenya Electrical Trades and Allied Workers Union (KETAWU). The proposed union would only target and draw membership from electricity utility companies. On the other hand KETAWU drew its membership from the electrical industry. KETAWU's targeted members were workers engaged in production and use of electrical devices.

16. In her notice of refusal of registration, the Registrar stated that KETAWU's constitution stated that membership was open to all employees engaged in electrical generation, electricity energy transmission, electrical energy distribution, electrical and electronic contractors, repairers, dealers, the energy regulatory Board, Geothermal development, nuclear power energy and overhead power lines. This sector coverage according to the Registrar was already sufficiently covered by KETAWU.

17. The appellants in their submissions contended that they targeted mainly employees of Kengen, GDC, Ketraco and Rea. They also intended to recruit from employees of KPLC. These bodies according to the appellants were electricity utility companies and were mainly state owned. They were concerned mainly with power generation and transmission according to the appellant. The workers in this sector were not sufficiently represented by KETAWU. The appellants pointed to the fact that there was not yet in existence a recognition agreement between KETAWU and the target organizations. This according to the appellant demonstrated that workers in the sector could not participate in collective bargaining through KETAWU.

18. The Interested Parties name is Kenya Electrical Trades and Allied Workers Union. Concise Oxford Dictionary defines trade as buying and selling of goods and services. In the context of electricals, this

imports dealing in electrical products and related services. The interested party has a part of its membership unionisable employees of Kenya Power Company and now seek recognition from Kengen, GDC, Ketraco and Rea. These bodies apart from KPC do not sell or buy electrical products. They produce and or transmit or supply electricity. Their inclusion in the membership of the interested party can only fall under the rubric of “allied”.

19. The court takes judicial notice of the fact that most unions use the world allied to cover as much territory as possible. There was a time when Kenya Union of Commercial, Food and Allied Workers Union and Kenya Union of Domestic, Educational Institutions, Hospitals and Allied Workers Union covered virtually any sector imaginable under their omnibus name. We have since seen several break away unions from them. For example we now have Banking and Financial Institutions Union, Kenya National Nurses Union, Kenya Private Security Workers Union and so on. Infact majority of the existing unions were once upon a time falling under KUCFAW or KUDHEIHA.

20. Whereas it must be appreciated that the duty vested upon the Registrar of Trade Unions is to ensure a balance between fragmentation and proliferation of trade unions, this duty must not be undertaken mechanically or used to block registration of new unions where merited. While the policy for a long time has been to keep the number of unions fewer and membership larger, developments in the sector has seen the registration of near specialists unions. For instance Kenya Medical Practitioners, Dentists and Pharmacists Union exist side by side with Kenya National Union of Nurses. We also have Kenya National Union of Teachers existing side by side with Kenya Union of Post Primary Education Teachers. There are a few examples that demonstrate that developments in the union movement has made it necessary for the Registrar of Trade Unions to look deeper into an application for registration of a trade union to see if indeed promoters have identified a gap in representation by an existing union. It is not enough that there exists a union with constitution drafted wide enough to cover the areas intended to be covered by a proposed union. Representation must be factual and not notional. The unionisable employees must feel the actual presence of the union representing them over their work related issues.

21. The appellants have pointed and the interested party does not deny that they do not as yet have a recognition agreement with GDC, REA, Kengen and Ketraco. This therefore meant that unionisable employees in these organizations have not benefited from any collective bargaining. Justice Rika in the case of **Kenya Concrete, Structural, Ceramic Tiles Wood Plys and Interior Designs Workers Union Vs Registrar of Trade Unions & Another [2013] eKLR** observed that:

“there is no hard and fast rule as to what is sufficiency of representation. In the view of the court, sufficiency of representation is not merely to be read from the constitution of the already registered trade union. Sufficiency of representation must include what the High Court in Civil Appeal 176 of 1996 characterized as real and practical representation of the interests of the members. This should include how well and visibly such trade union represents its members in courts, be it on disputes relating to rights or interests. Sufficiency of representation must be seen in the quality and number of Collective Bargaining Agreements concluded...”

22. The Interested Party herein has conceded that it is yet to enter into a recognition agreement with most of the organizations from which the appellant intend to have sphere of influence this therefore means their presence in these organizations is missing. Further, the appellants have stated that the target companies are parastatals. The issues affecting unionisable employees working in these organizations and their interaction with the government may not be effectively represented in a union where they are grouped under the rubric “allied”. They form a significant constituency which ought to have a union whose mandate is centrally them and not in the periphery as currently obtaining under KETAWU.

23. In the circumstances the court finds the appeal merited and is hereby allowed with consequence that the decision of the Registrar of Trade Unions dated 26th September, 2014 is hereby quashed and an order is hereby made directing the Registrar of Trade Unions to unconditionally register the appellant’s union and issue them with a certificate.

24. Each party to bear their own costs.

25. It is so ordered.

Dated at Nairobi this 10th day of November 2017

Abuodha J. N.

Judge

Delivered this 10th day of November 2017

In the presence of:-

..... for Claimant

.....for Respondent

Abuodha J. N.

Judge