



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL NO. 19 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 28th January, 2016)

1. JOSEPH AMWAYI DAVID

2. JOSEPHINE KADENYI

3. MUSA KIBAYA KEHIMA

4. MOSES MWANGI

5. ALEX SHISANYA

6. WACERA MUIA

7. BETH NJUGUNA

8. HELLAH INGALIA

9. MILDRED KADENYA

10. LYDIAH ANDESO

PROPOSERS & PROMOTERS OF KENYA

HOUSE HELP, DRIVERS, CARETAKERS

AND ALLIED WORKERS' UNION

(KHODCAWU)

.....APPELLANTS

VERSUS

THE REGISTRAR OF TRADE UNIONSRESPONDENT

RULING

1. This appeal was filed by the Appellants herein through the firm of Enonda, Makoloo, Makori & Company Advocates against the decision of the Registrar of Trade Unions refusal to register the Kenya Househelp, Drivers, Caretakers and Allied Workers Union "KHODCAWU". The decision appealed

against is based on the letter dated 3rd November 2014 by the Respondent refusing to register the said “KHODCAWU”.

2. The appeal is based on the following grounds:

a) That, the Appellants herein did make an application to be issued with a “Certificate of Establishment of a Trade Union” to the office of the Registrar of Trade Unions on 7th November, 2014 through Linet Aliviza and Mrs. Hellen Mudamba on behalf of the rest as entitled under Section 12 of the Labour Relations Act, No. 14 of 2007, Laws of Kenya as read together with Articles 35 and 41 of The Constitution of Kenya “annexed hereto and marked “KHODCAWU-1” is a copy of the application letter”.

b) That, the Registrar of Trade Unions, the Respondent herein have erred in law and in fact and, made an unlawful, illegal and unconstitutional decision on 14th November, 2014 by denying the Appellants a “Certificate of Establishment” of a trade union in disregard of express provisions of Article 36 of The Constitution of Kenya, that states inter alia:-

(i) 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.

(ii) A person shall not be compelled to join an association of any kind.

(iii) Any legislation that requires registration of an association of any kind shall provide that:

(a) Registration may not be withheld or withdrawn unreasonably; and

(b) There shall be a right to have a fair hearing before a registration is cancelled”

“Annexed hereto and marked ‘KHODCAWU-2” is a letter refusing to issue a Certificate”

a) That, the Respondent herein erred in law and in fact and made an unlawful, illegal and unconstitutional adverse decision dated 3rd November, 2014, to deny the Appellants herein a “Certificate of Establishment” without the due regard to Article 41 of the Constitution of Kenya that states inter alia:-

(1) Every person has the right to fair labour practices.

(2) Every worker has the right:-

a) To fair remuneration;

b) To reasonable working conditions;

c) To form, join or participate in the activities and programmes of a trade union; and

d) To go on strike

b) That, the Respondent herein erred in law and in fact, made an unlawful, illegal and unconstitutional decision dated 14th November, 2014 in utter contravention of the mandatory provisions of Section 12 and 13 of the Labour Relations Act No. 14 of 2007, laws of Kenya, that states inter alia:-

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)

And

"S 13 a trade union or employers organization shall apply to the Registrar for registration within six months of receiving a certificate issued under Section 12".

b)That, the Appellants herein contend that it is only after they had duly complied in making an application to register a trade union under Section 13 and 14 of the Labour Relations Act, No. 14 of 2007, Laws of Kenya, that the Respondent was entitled to raise an objection more so and specifically only after having comprehensively exhausted the mandatory requirements of the last paragraph of Section 14(1) (d) that states inter alia:

"Provided that the Registrar shall, by notice in the Gazette and in one national daily newspaper with wide circulation, notify any registered trade union, federation of trade unions or employers' organisations which appear to him to represent the same interest as the applicants of the receipt of such application and shall invite the registered trade union federation of trade unions or employers' organisation concerned to submit in writing, within a period to be specified in the notice, any objections to the registration;

c) That, the Appellants herein aver the application to the Registrar of Trade Unions for the issuance of a certificate for the establishment of a trade union was not defective and hence, the Respondent had no alternative option other than to duly comply with the provisions of Section 12 (3) of the Labour Relations Act, No. 14 of 2007, Laws of Kenya.

d) That, the name of the proposed trade union is not in any form or manner the same as that of an existing trade union or sufficiently similar, so as to cause confusion that may have driven the

Registrar of Trade Unions to otherwise form a negative opinion towards the promoters of the KENYA HOUSEHELP, DRIVERS, CARETAKERS AND ALLIED WORKERS UNION – KHODCAWU which union is a Specialized Sectoral Industrial Trade Union” and that therefore, the Respondent’s decision to deny the Appellants a “Registration” was NULL and VOID ab initio.

e) That, the Appellants herein aver that the reference as made to Section 14(1) (d) of the Labour Relations Act, No. 14 of 2007, Laws of Kenya by the Registrar of Trade Unions would only be legally applicable where and when Section 12 and 13 had been duly complied with by the Respondent.

f) That, the Respondent herein erred in law and in fact dealing with and having her decision clouded with the concerns of the Kenya Union of Domestic, Hotels, Educational Institutions, Hospital and Allied Workers, before first publishing a Notice in the Kenya Gazette and in the National daily newspapers with wide circulation as required under Section 14 of The Labour Relations Act, No. 14 of 2007, Laws of Kenya. “Annexed hereto and marked “KHODCAWU – 3” are sample copies of previous published notices by the Registrar of Trade Union’s office.

g) That, the Respondent herein erred in law and in fact by failing to take cognizance of the International Standards of Classification of Economic Activities which calls for one trade union for a Sector, and the spirit of the ILO Convention No. 87 and The Industrial Relations Charter, to which both clearly propagate the promotion and the nurturing of the growth of Industrial Trade Unionism.

h) That, the Respondent erred in law and in fact in failing to take into account the current trend of registration of trade unions by the Registrar of Trade Unions or through Court Orders inspite of the existence of the Kenya Union of Domestic, Hotels, Educational Institutions, Hospital and Allied Workers.

- 1. The Kenya Hotels and Allied Workers Union.**
- 2. Universities Non-Teaching Staff Union.**
- 3. Kenya Union of employees of Polytechnics, Colleges and Allied Institutions.**
- 4. Kenya National Union of Nurses.**
- 5. Kenya Universities Staff Union.**

i) That, the decision of the Respondent by her letter dated 14th November, 2014 in regard to the letter of Application for a Certificate of Establishment is totally misconceived and contravenes Article 2 (4) of the Constitution of Kenya.

j) That, the Appellants herein would wish to reply on the following Authorities:

(i) Appeal No. 1 of 2010, Ruling delivered on 1st February, 2012, by Hon. Justice James Rika, “Annexed hereto and marked “KHODCAWU – 4”.

(ii) Petition/Appeal No. 50 of 2012, Judgment delivered on 16th April, 2013, by Hon. Justice Mathews N. Nduma, “Annexed hereto and marked “KHODCAWU – 5”.

(iii) Appeal No. 10 of 2011, Judgment delivered on 9th December, 2013 by Hon. Justice James Rika, “Annexed hereto and marked “KHODCAWU – 6”.

(iv) Appeal No. 1 of 2011, Judgment delivered on 16th January, 2014 by Hon. Justice

James Rika, “Annexed hereto and marked “KHODCAWU – 7” and such other authorities.

(v) Appeal No. 10 of 1999 delivered on 25th October 1999 by Justice J. K. Mitey. “Annexed hereto and marked “KHODCAWU – 8”.

3. The Appellant seeks the following orders:

a) That, an immediate annulment of the decision of the Registrar of Trade Unions made by her letter dated 14th November, 2014 and that the same be reviewed and set aside.

b) That the Registrar of Trade Unions to unconditionally issue a “CERTIFICATE FOR ESTABLISHMENT “ of a trade union forth with; and or

c) That the Registrar of Trade Unions be ordered to unconditionally register the KENYA HOUSEHELP, DRIVERS, CARETAKERS AND ALLIED WORKERS UNION ‘ “KHODCAWU”.

d) That costs of this Appeal be borne by the Respondent.

e) That any other further and better relief that his Honourable Industrial Court may deem fit to grant be granted.

4. This Appeal is also supported by a verifying affidavit of one Beth Njuguna (Appellant No. 7) who deposes that she has the authority of the other Appellants to swear the said affidavit.

5. The Respondents filed their response to the Memorandum of Appeal on 29.10.2015 through the office of the Attorney General. The Respondents aver that they indeed received an application seeking for a Certificate to undertake lawful trade union activities dated 7th November 2014 on 12.11.2014. On 14th November 2014 the Respondent responded to the application and sought clarification on the scope of the representation.

6. On 15th December 2014, the Appellant moved to Court. That by that time, the Respondent had not made a decision either to issue the Certificate or not as the Appellants had not responded to the letter dated 14th November 2014.

7. The Respondents aver that under Section 30 of the Labour Relations Act, a person aggrieved by a decision of the Registrar made under the Act may appeal against the decision within a period of thirty days of that decision. The Respondent avers that they are yet to make a decision on the said Application and so there is nothing to appeal against at this juncture. They therefore submit that the appeal is prematurely before the Court and the same should be dismissed with costs.

8. I have considered the averments of both parties and submissions filed. The issues to determine are as follows:

1. Whether the Appellants fulfilled the requirements for issuance of the Certificate.

2. Whether the Respondent, blatantly and in disregard to the law deliberately failed to issue the Appellants with the Certificate.

3. What remedies if any are available in the circumstances.

9. In the 1st case, both the Appellants and Respondent are agreeable that the Appellants did submit their application. This was after fulfillment of the provisions of the Labour Relations Act. Their letter is dated 7th November 2014.

10. On 14th November 2014 the Respondent replied as follows:

“Reference is made to your application dated 7th November 2014.

As you may be aware, house helps are already represented by the Kenya Union of Domestic, Hotels and Education Institutions, Hospitals and Allied workers (KUDHEIHA).

As for the drivers and caretakers, please note that you did not indicate the scope of representation you intend to recruit to enable me elicit a response.

E.N. GICHEHA (MRS.)

REGISTRAR OF TRADE UNIONS”

11. The letter is non-committal on whether the application had been accepted or rejected. The letter also did not require any further response from the Appellants as it didn't ask for any other particulars. This letter however seemed to indicate that KUDHEIHA was already representing house helps and so it may not be possible to have the intended union accepted. All these replies however were not made in finality.

12. However, what would have been the prudent thing to do would have been a response from the Appellants indicating that indeed KUDHEIHA was representing some house helps but that may be not be an issue that the Respondent should depend on in determining their application. They would also have given a response indicating the scope of the drivers and caretakers they wished to recruit given that there are other unions covering different categories of driver of Long Distance and Truck Drivers, drivers in the matatu industry etc.

13. However, on 15.12.2014, the Appellants filed this appeal. The question then is whether the Respondent had already refused to issue the intended union with a Certificate of establishment of a trade union as the Appellants have submitted.

14. Section 12 of Labour Relations Act states as follows:

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.

15. My reading of this Section shows that Under Section 12 (2) (c) and (3) (b) above certain conditions must be met. There are certain prescribed information which may be included in the application. Indeed specifying the names, and scope is important.

16. I believe in seeking to know the scope of the intended union, the Respondent was in order and the Registrar still had 30 days to make up her mind whether to reject or accept the application and after receiving the information the Appellants were to provide. The Appellants however moved to Court without further recourse to the letter from the Registrar dated 14.11.2014.

17. It is this Court's finding that the point of rejection of issuance of Certificate of establishment of a trade union had not yet been arrived at by the Respondent and the Appellants rushed to Court prematurely. Given this reason, it will not be necessary to go into the merits or otherwise of the other issues.

18. The Appeal was prematurely instituted. I will however urge the Appellants to exhaust all avenues possible to enable registration of their Union after following all due process. The Appellants will pay costs of this Appeal.

Dated and delivered in open Court this 28th day of January, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Chege for the Respondent – Present

Kashudi holding brief for Enonda for Appellants – Present