



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

APPEAL NO 1 'A' OF 2012

HON. JUSTUS ALOO OGEKA

OUMA JUMA

SEBASTIAN NGORWE

RICHARD ONGORO

MARK AMIMO

MONICA KENDI

NANCY JERUTO

(as Interim Officials of Kenya National

Union of Cooperatives Staff).....APPELLANTS

VS

REGISTRAR OF TRADE UNIONS.....RESPONDENT

AND

KENYA UNION OF COMMERCIAL

FOOD AND ALLIED WORKERS.....1ST INTERESTED PARTY

BANKING INSURANCE

AND FINANCE UNION (K).....2ND INTERESTED PARTY

JUDGMENT

(Appeal from the decision of the Registrar of Trade Unions dated 27th November 2012

refusing to register Kenya National Union of Cooperatives Staff)

Introduction

1. This appeal arises from the decision of the Registrar of Trade Unions dated 27th November 2012 refusing to register Kenya National Union of Cooperatives staff. The 1st and 2nd Interested Parties were joined in these proceedings by an order of this Court issued on 20th January 2014. The appeal took an unusually long time to be heard and determined owing to an interlocutory application brought by the 2nd Interested Party. The application found its way to the Court of Appeal where interim stay orders barring further proceedings before this Court were granted. The interim orders were vacated by the Court of Appeal on 22nd July 2015 paving way for final determination of the appeal.

The Appeal

2. In their Memorandum of Appeal filed in Court on 24th December 2012, the Appellants cite the following grounds:

a. That the Registrar of Trade Unions erred in law and in fact in failing to find that the cooperative sector has grown exponentially over the years and currently employs hundreds of thousands of Kenyans who deserve protection and representation by a trade union that is specific to the needs of the cooperative sector;

b. That the Registrar of Trade Unions erred in law and in fact in failing to find that the Constitution and the relevant law entitle individuals to freedom of association; which includes the right to form, belong to and participate in trade unions of one's choice and that the decision appealed is a violation of this fundamental right;

c. That in refusing registration of the proposed union, the Registrar proceeded without granting the interim officials of the proposed union a fair hearing contrary to the law and the rules of natural justice;

d. That in refusing registration of the proposed union, the Registrar failed to take into account relevant factors/considerations and proceeded on the basis of irrelevant/extraneous matters;

e. That in refusing registration of the proposed union, the Registrar abdicated his statutory duty and subordinated his office to the National Labour Board;

f. That the decision to deny registration flies in the face of the Appellants' legitimate expectation to fair, reasonable and lawful administrative action;

g. That the decision to deny registration of the proposed union is unreasonable, in bad faith and amounts to unfair refusal to exercise statutory power;

h. That on the whole, the decision of the Registrar does not adduce any sufficient reasons to justify the act of refusal, is inexplicable on the facts and the law relevant to the matter.

3. In a supporting affidavit sworn by the 1st Appellant, Justus Aloo Ogeka on 14th December 2012, it is deponed that on 27th June 2011, the Registrar of Trade Unions issued a certificate empowering the interim officials of the proposed union to recruit members. Pursuant to the certificate, the interim officials proceeded to recruit members in readiness for application for formal registration which was lodged on 5th July 2011.

4. On 4th November 2011, the Registrar put out a public notice in the *Star* Newspaper notifying the public of the application for registration and on 10th February 2012, he published a notice in the Kenya Gazette notifying select trade unions of the application. Only Kenya Union of Commercial Food and Allied Workers (KUCFAW) raised an objection claiming that it covered employees in the cooperative sector intended to be covered by the proposed union. On 12th March 2012, the Appellants responded to the objections by KUCFAW.

5. On 27th November 2012, the Registrar wrote to the Appellants informing them that the National

Labour Board had decided to refuse registration of the proposed union; stating that there were already registered trade unions sufficiently representative of the whole or a substantial proportion of the interests in respect of which the registration of the proposed union was sought.

6. Ogeka further depones that he is aware that KUCFAW previously covered employees in the banking, insurance and financial sectors. KUCFAW also used to represent workers in the private security sector and those in the bakery and confectionery sectors all of whom now had registered trade unions specific to the respective sectors.

7. He adds that he is aware that KUCFAW represents hardly 20% of workers in the cooperative sector while other workers had sought representation in Banking Insurance and Finance Union (BIFU). Majority of persons employed in the cooperative sector remained unrepresented due to lack of a union specific to the cooperative sector.

The Respondent's Reply

8. In a replying affidavit sworn by the Registrar of Trade Unions, Elizabeth Gicheha on 14th July 2014, it is deponed that in response to the public notice published in the *Star* Newspaper on 4th November 2011, KUCFAW filed an objection on 24th February 2012 citing Rule No. 5 of its registered Constitution which adequately covers employees intended to be covered and served by the proposed union.

9. On 22nd November 2012, the Appellants' application was placed before the National Labour Board as required under Section 31(3) of the Labour Institutions Act and Section 12 of the Labour Relations Act. The application was declined and the decision of the National Labour Board was conveyed to the Appellants by letter dated 27th November 2012.

10. Gicheha states that KUCFAW and BIFU, the 1st and 2nd Interested Parties herein adequately cover the employees of cooperative societies. Citing Section 14 of the Labour Relations Act and the Industrial Relations Charter, the Registrar maintains that registration of trade unions should be based on industrial lines. Further, according to a Government policy only viable, independent and democratic trade unions should be registered.

The 1st Interested Party's Response

11. The response by the 1st Interested Party, KUCFAW is contained in a replying affidavit sworn by its Secretary General, Bonface M. Kavuvi on 6th August 2014. Kavuvi depones that KUCFAW is registered to represent all unionisable workers engaged in Cooperative and Credit Societies.

12. Citing Rule No. 5 of the KUCFAW Constitution, the Secretary General states that membership is open to employees engaged in distributive and commercial sectors, including cooperative societies. The proposed union therefore sought to represent interests which KUCFAW effectively represents. In his affidavit, Kavuvi gives a list of 20 Collective Bargaining Agreements (CBAs) signed between various cooperative societies and KUCFAW.

The 2nd Interested Party's Response

13. The 2nd Interested Party filed a Response and Submissions on 11th July 2014 stating that it has a registered Constitution providing for coverage of Savings and Credit Cooperative Societies (SACCOs). In explaining why it did not file objection to the application by the Appellants at the stage of publication of Gazette Notice No 1566 of 10th February 2012, the 2nd Interested Party states that after perusal of the Constitution of the proposed union, it formed the opinion that the targeted areas of coverage were the primary cooperatives cutting across areas covered by the 1st Interested Party and the Union of Kenya Civil Servants.

14. The 2nd Interested Party further states that having been notified by the Respondent of yet another application for registration by a union in the name of Savings and Credit Societies Workers, it filed an

objection on 12th September 2013 as the area of coverage was in the money market.

15. With regard to this appeal, the 2nd Interested Party's issue has to do with inclusion of Savings and Credit Cooperative Societies in the area of coverage by the proposed union. The 2nd Interested Party attacks the Appellants' assertion that there is a large number of employees in the cooperative sector requiring representation by a specific trade union as no specific cooperative union that is not wholly or substantially covered by the 1st and 2nd Interested Parties has been cited.

Determination

16. From the pleadings, supporting documents and submissions filed in Court, the following issues emerge for determination:

- a. Whether the refusal to register the proposed union amounts to an infringement of the Appellants' constitutional rights;
- b. Whether the interests intended to be covered by the proposed union are adequately covered by the 1st and 2nd Interested Parties;
- c. Whether the Registrar of Trade Unions subordinated his statutory duty to the National Labour Board.

The Appellants' Constitutional Rights

17. It was submitted on behalf of the Appellants that the refusal to register the proposed union was an affront to the Appellants' rights under Articles 36 and 41 of the Constitution. Article 36 deals with freedom of association generally while Article 41(2) guarantees the right to subscribe to a trade union of one's choice which right is also secured by Section 4(1) of the Labour Relations Act.

18. In its submissions filed on 11th March 2015, the 1st Interested Party submits that the Appellants' right under Article 41(2) is not absolute and is subject to limitation under Article 24 of the Constitution.

19. Article 24 provides for limitation of rights and fundamental freedoms in the following terms:

24. (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only 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-

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of limitation;

(c) the nature and extent of limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom-

(a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;

(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and

(c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

20. I agree with the 1st Interested Party that the Appellants right under Article 41(2) is subject to limitation under Article 24. The question is whether the decision to refuse registration of the proposed union is a justifiable limitation of the Appellants' right.

21. In its grounds of opposition to the appeal, the 2nd Interested Party made reference to Section 14 of the Labour Relations Act which limits registration of trade unions on sector lines. The same provision allows the Registrar of Trade Unions to refuse registration of a proposed trade union if there is already a registered union representing the whole or a substantial part of the interests sought to be covered by the proposed union. The 2nd Interested Party also made reference to the Industrial Relations Charter (1984) which gives guidelines on registration of trade unions on industrial/sector lines.

22. In order to answer the question whether the refusal to register the proposed union was a justifiable limitation of the Appellants' right under Article 41(2), I must examine the reason for the refusal.

Reason for Refusal: Interests Adequately Covered by the 1st and 2nd Interested Parties

23. At the interlocutory stage, the Court rejected the 2nd Interested Party's attempt to introduce matters of procedure before the National Labour Board. In making its decision at this stage, the Court was informed by the fact that the jurisdiction of this Court in matters relating to registration of trade unions is appellate and the Court cannot therefore go behind the decision appealed.

24. The decision giving rise to this appeal is contained in letter dated 27th November 2012 which I find necessary to reproduce in its entirety:

“MLHRD/TU/R/17/1

27th November, 2012

The Secretary General

Kenya National Union of Co-Operative Staff

P.O. Box 55780-00200

NAKURU

Dear Sir

RE: THE TRADE UNIONS ACT

APPLICATION FOR REGISTRATION OF A TRADE UNION

I refer to your application for registration of Kenya National Union of Co-operatives staff dated 4th July, 2011 which was submitted on 5th July 2011. I wish to inform you that your said application was presented to the National Labour Board which met on 22nd November, 2012 for deliberations and consideration.

The board noted that your application was objected to by Kenya Union of Commercial Food and Allied Workers who claim that, the employees in the Co-Operative sector were adequately covered

and served by them.

Upon considering your proposed area of coverage and that of the existing union, namely Kenya Union of Commercial Food and Allied Workers the board resolved that your application be refused as the existing union (KUCFAW) sufficiently represented the interests of workers in the Co-operative sector through its branches which are spread throughout the country. I now enclose a notice of refusal as per the form D.

W.K. LANGAT

REGISTRAR OF TRADE UNIONS

25. From this letter the reason for refusal of registration of the proposed union is that the interests intended to be covered are adequately covered by KUCFAW, the 1st Interested Party. For some vague reason BIFU, the 2nd Interested Party did not file any objection but the Court, on its own motion and purely in the interest of justice invited them to participate in these proceedings.

26. The question then is whether the 1st and 2nd Interested Parties adequately cover the interests intended to be covered by the proposed union. The Interested Parties have an interesting history. BIFU was registered as a trade union on 7th May 1986 and following a long drawn legal battle with KUCFAW the Court of Appeal confirmed the registration on 15th July 1994.

27. Thereafter, the two unions were engaged in industrial rivalry within the banking sector. In 1998 there was a nationwide strike by bank employees which KUCFAW did not support, prompting a fallout with the employees. BIFU was quick to reap the benefits and there was a major shift in membership with BIFU attaining a simple majority in the banking sector.

28. In a landmark decision by the **Saeed R. Cockar J** in **Banking Insurance and Finance Union (K) v Kenya Bankers (Employers) Association and Kenya Union of Commercial Food and Allied Workers (Cause No. 75 of 1999)**, KUCFAW was ordered to vacate the banking sector in favour of BIFU. In making the Award **Cockar J** observed that BIFU was a specialist union for banks, insurances, building societies and other financial institutions.

29. History seems to be repeating itself and this Court is now being asked to look into the membership of both KUCFAW and BIFU and create further demarcation in favour of a specialist trade union for cooperative societies. A lot has happened since the decision by **Cockar J**. The banking sector has grown tremendously; first by the sheer increase in the number of banks both local and foreign, second by other financial institutions such as building societies and micro finance institutions being brought under Central Bank of Kenya regulation.

30. There has been growth in the cooperative sector as well and amendments have been made to the Cooperative Societies Act to reflect this growth. With regard to SACCOs in particular, a new regulatory body known as the SACCO Societies Regulatory Authority (SASRA) is now in place. Moreover, by virtue of Regulation 8(1) of the Sacco Societies (Deposit-Taking Sacco Business) Regulations, 2010, Saccos may be licensed to carry out deposit-taking Sacco business. This is growth that cannot be ignored.

31. The Court was referred to a 1965 Government policy on Trade Union Organization in Kenya providing for amalgamation of trade unions '*in order to have fewer but stronger and viable trade unions.*' The only thing I will say about this policy is that it is outdated and not in sync with current sector and industry developments (see **Seth Panyako & 5 Others v Attorney General & 2 Others [2013] eKLR**). We are living in the constitutional age and any limitation of rights must be justifiable.

32. None of the parties gave empirical data on the number of employees in the subject sector. However, in determining demarcation of sector lines, the Court must be guided by more than numbers. In this regard,

the Court ought to take judicial notice of institutional and legal developments in the sector.

33. For some reason that was not explained to the Court, KUCFAW has retained the word '*Allied*' in its name despite express instructions by the Registrar of Trade Unions in his letter dated 18th October 2011. Significantly, this gives the Union an omnibus identity giving rise to ambiguity in the area of coverage. It is easy for such a union to make forays into any and every sector leading to industrial disharmony. It was not lost on the Court that the list of cooperative societies with which the 1st Respondent had CBAs was a mixed grill of primary cooperative societies as well as Saccos.

34. With regard to the stake laid by BIFU, there is the obvious complication that in employment based Saccos, the employees are employed by members who are themselves employees of a primary employer and the possibility of BIFU representing both categories of employees is real. The result would be a union representing both the employer and the employee, all be it under different CBAs. I think there would be a serious conflict in such a scenario and a demarcation is well advised.

35. Overall, the Court finds that the cooperative sector constitutes a distinct and specialist sector that is not adequately covered by either the 1st or 2nd Interested Party.

The Role of the National Labour Board and the Registrar of Trade Unions

36. The final issue in this appeal has to do with the role of the National Labour Board and the Registrar of Trade Unions. The Appellants submitted that in dealing with their application for registration, the Registrar subordinated his statutory duty to the National Labour Board.

37. The relevant legal provisions on this issue provide as follows:

a. Section 19(1) of the Labour Relations Act:

“If the Registrar is satisfied after consulting the Board, that a trade union, employers' organisation or federation that has applied for registration meets the requirements of the Act, the Registrar shall register that trade union, employers' organisation or federation”

b. Section 31(1) of the Labour Institutions Act:

“The Minister shall appoint a Registrar of Trade Unions who shall be responsible for the registration and regulation of trade unions, employers' organisations and federations”

c. Section 31(3) of the Labour Institutions Act:

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

38. From these provisions, it is clear that the statutory duty to register and regulate trade unions lies with the Registrar of Trade Unions. The role of the National Labour Board is advisory. The letter refusing to register the proposed union which I have reproduced above, appears to suggest that the Registrar was merely communicating the decision of the National Labour Board. This letter gives the impression that the Registrar was acting on the instructions of the National Labour Board. With much respect, this is a serious abdication of a statutory duty which must be discouraged.

39. Parties presenting their applications to the Registrar expect that he will exercise his powers judiciously and fairly and when he appears to abdicate this duty to the National Labour Board which is itself over-populated by industry players, the Registrar does a great disservice to the labour movement and to the Nation.

40. Even worse, there was no evidence that the Appellants' response to the objection by KUCFAW was given any consideration. As held by **Rika J** in ***Dishon Angoya & 6 Others v Registrar of Trade Unions***

(Appeal No. 10 of 2011), while Section 14 of the Labour Relations Act provides a valid limitation in the exercise of the freedom of association, that limitation must be effected judiciously and fairly. In the case before me, there was no evidence that the Registrar or even the National Labour Board acted within these parameters in denying the Appellants registration of their trade union.

Final Orders

41. For the foregoing reasons I make the following orders:

- a. The appeal against the decision of the Registrar of Trade Unions refusing to register Kenya National Union of Cooperatives Staff is allowed;
- b. The objections by the 1st and 2nd Interested Parties are rejected;
- c. The Kenya National Union of Cooperatives Staff is hereby granted registration from the date of this Judgment ;
- d. The Registrar of Trade Unions is directed to issue the Appellants with a certificate of registration and enter the name and particulars of the Trade Union in the appropriate register forthwith;
- e. Each party will bear their own costs.

42. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 22ND DAY OF JANUARY 2016

LINNET NDOLO

JUDGE

Appearance:

Mr. Miyare for the Appellants

Ms. Chege for the Respondent

Mr. Nyabena for the 1st Interested Party

Ms. Guserwa for the 2nd Interested Party