



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

APPEAL NUMBER 12 OF 2014

FELIX MUSYOKI SAMMY PAUL NDUHIA MUNGE

JAQUELYNE OTSIALO CHUNGE MARY GORETTI NYAMBURA EDWIN GICHANE

MONICA KAMANDE

NICHOLAS MUTISYA MALELU (Appealing as the promoters of)

THE KENYA PUBLIC SCHOOLS NON TEACHING

STAFF UNION (KEPUSNTESU).....APPELLANT

VERSUS

THE REGISTRAR OF TRADE UNIONS.....RESPONDENT

AND

THE KENYA UNION OF DOMESTICE, HOTELS,

EDUCATIONAL INSTITUTIONS, HOSPITALS AND

ALLIED WORKERS (KUDHEIHA).....INTERESTED PARTY

JUDGMENT

1. This is an appeal against the decision of the Registrar of Trade Unions refusing to register the appellant as a Trade Union under the Labour Relations Act.
2. In refusing the application the Registrar stated as a ground for refusal that there was already a registered trade union namely Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA) which was sufficiently representative of the whole or substantial proportion of the interests in respect of which the appellant sought registration.
3. The appellant faulted the decision of the registrar contending among others that they have a constitutionally protected right to association. To this end the appellant relied on article 36(1) and 41(1) (c) of the Constitution. While acknowledging that these rights are not absolute, Counsel for the appellant submitted that under article 24, limitation of rights and fundamental freedoms must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

4. According to Counsel in saying that there was already a registered trade union (KUDHEIHA) which sufficiently represented the whole or substantial proportion of the interest in respect of which the appellant sought registration, their constitutional rights have been limited and this limitation was not reasonable and justifiable in an open and democratic society.
5. According to Counsel the professional non-teaching staff in public schools are inadequately protected due to the all-inclusive nature of KUDHEIHA constitution. Further, while it was good public policy to avoid proliferation of small trade unions, the constitution of the appellants had focused in an area that given time, they would have membership base in excess of 200,000. The appellant further submitted that the extent of limitation of the two Constitutional rights had the effect of causing a discriminatory effect, since professional non-teaching staff in public schools have the right to choose which union represents their interest and in declining to allow them that right the Registrar perpetuated inequality.
6. The respondent on its part submitted that although the Constitution provides for a myriad of rights, these rights are not absolute. To this end Ms. Akuno cited article 24(1) of the Constitution and the dictum of Madan J (as he then was) in **Githunguri v. R(1986) KLR**. According to Counsel no fundamental right of the appellant had been breached.
7. Counsel further submitted that the matter had crossed the threshold of being a violation of the Constitution and statute and had become an evidentiary one which the appellants had failed to provide evidence to.
8. The powers exercised by the Registrar are in line with the provisions of Labour Relations Act. Whereas section 12 of the Act allowed for provisional registration of a proposed trade union, section 14(11) (d) grants the respondent power to refuse registration to a proposed union where another union of employees already exists which sufficiently represents the whole or substantial proportion of the interests which the applicant seeks.
9. According to Counsel the appellants have failed to establish any procedural illegality in the manner in which the decision was undertaken. Ms. Akuno further submitted that the spirit of section 14 of the Labour Relations Act was meant to discourage the proliferation of trade unions within the same sector and instead encourage the formation of strong union which are viable. It was with this in mind that the respondent refused the appellant registration.
10. According to Counsel, KUDHEIHA's constitution provided that membership was open to among others all persons employed as non-teaching staff, as subordinates and professionals in all private and public educational institutions and organizations including primary and secondary schools. The appellant's constitution provided for membership of professional non-teaching staff in public schools which was inclusive of primary and secondary schools. According to Ms. Akuno, a literal reading of the two provisions clearly highlighted an intersection of roles. Were the respondent to grant the appellant's application, it would have substantively breached the spirit of the Labour Relations Act by supporting duplicity and overlap of roles within the sector.
11. According to Counsel, the claim by the appellants that the proposed union would specifically service professionals as opposed to non-professionals who substantially make up the composition of the interested party only highlights the appellants attempt at creating a specialized union. Counsel contended that no specialization was required to represent the class of persons specified. To support this submission, Counsel relied on the case of **Kenya Tea Workers Union V. Registrar of Trade Unions HCCC No. 248 of 1998**.
12. Appeals from the decisions of the Registrar of Trade Unions to this Court present considerable challenge since the Court is called upon to look afresh at the application together with the supporting documents and see if the Registrar made a sound decision in the circumstances.
13. In this particular case the Registrar was of the view that the interests or class of persons which the appellant intended to represent were sufficiently represented by an existing union namely KUDHEIHA.

In reaching this decision the Registrar was guided by the appellant's proposed constitution, and representations by the interested party namely KUDHEIHA. The Registrar was further guided by policy and experience of her office as a Registrar. The decision was therefore made administratively and in the course of her duties as a Registrar. In absence of any bias or improper motive, the Court ought to be reluctant to substitute its own view with that of the Registrar. If it be the policy of the Government and the trade union movement that specialist unions should be discouraged and that unions are stronger when bigger, the Court would not interfere with such a policy if it be in the interest of the labour movement.

14. It is therefore inappropriate to introduce constitutional arguments in dealing with what is purely policy and administrative issue. It is indeed true that article 36 and 41 of the Constitution read together protects the freedom to form and join a trade union of one's choice. However the exercise of this freedom is not absolute. It must be exercised in cognizance and conformity with policies and best practices in the labour movement. Limitation of the right to form and join a union of one's choice in recognition of policies and best practices which have been tested over time is reasonable and justifiable in an open and democratic society.

15. The Court therefore finds no fault with the decision of the Registrar in declining to register the appellant as a union on the grounds that there was already in existence a union that sufficiently represented the interests of the class of persons sought to be represented by the appellant.

16. The appeal therefore fails and is hereby dismissed with costs.

17. It is so ordered.

Dated at Nairobi this 14th day of October, 2016

Abuodha Jorum Nelson

Judge

Delivered this 14th day of October, 2016

In the presence of:-

.....for the Claimant

and

.....for the Respondent.

Abuodha Jorum Nelson

Judge