



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

APPEAL NO. 15 OF 2014

KENYA REVENUE AUTHORITY 1ST APPELLANT

EMPLOYEES UNION (KEREVU)

DENIIS ANYOKA 2ND APPELLANT

STEPHEN ACHENE SHIMEJERO 3RD APPELLANT

AND

THE REGISTRAR OF TRADE UNIONS 1ST RESPONDENT

THE NATIONAL LABOUR BOARD 2ND RESPONDENT

AND

KENYA REVENUE AUTHORITY 1ST INTERESTED PARTY

BANKING INSURANCE & FINANCE

UNION 2ND INTERESTED PARTY

Mr. Achach for appellant

M/S Diana Mumo for Respondent (A.G.)

M/S Oyugi for 1st interested party

M/S Ashubwe for 2nd interested party

JUDGMENT

1. The appeal brought vide memorandum of appeal dated 3rd November 2014 and filed on 3rd November 2014, seeks the court to reverse the decision of the Registrar of Trade Unions in which he refused to register the appellant union, Kenya Revenue Authority Employees Union (KEREVU).

2. The appeal is based on the grounds set out in the memorandum of appeal as follows:

a) The respondents erred in sitting as an appellate court and deliberating on issues relating to Civil Appeal No. 255 of 2010 and finding that the same prohibited the 1st appellant from being registered which, to the appellant's knowledge does not have stay orders.

b) The respondents erred in finding that there was another institution which the 1st appellant was subject to, which the appellants considers as discrimination and that the respondents lacked such jurisdiction as the same had been dealt with in **Banking Authority and Finance Union –vs- Kenya Revenue Authority (2008) eKLR.**

c) The respondents erred in denying the 1st appellant its constitutional right to be members of a trade union of their choice yet the 1st appellant had complied with all the preconditions of establishing the same.

d) The respondents erred in allowing the 2nd respondents objection after the gazettelement of the 1st appellant had been done yet they had specifically been invited earlier on to raise objections within two (2) weeks of the notification through a letter dated 28th February, 2014.

e) That the grounds relied on by the 1st respondent to deny registration of the 1st appellant is unconstitutional and a violation of Article 41 of the Constitution of Kenya.

3. The memorandum of appeal is accompanied by a bundle of supporting documents marked 'A to Y' and affidavit in support of the appeal sworn by Dennis Anyoka, the Secretary General and one of the promoters of the appellant union on 3rd November 2014.

4. In the notice of refusal by the Registrar of Trade Unions dated 2nd October, 2014, the registrar stated, thus;

“There is already a registered trade union namely the Banking Insurance and Finance Union (KENYA) (BIFU) which is sufficiently representative of the whole or substantial proportion of the interests in respect of which you sought registration.

1. The constitution of BIFU provides for membership to all employees among others, working in parastatal Finance institutions. your intended sector of coverage being employees of the Kenya Revenue Authority is therefore sufficiently represented in terms of the scope of representation and targeted membership coverage.

2. There is a pending matter in Civil Appeal No. 255 of 2010 relating to similar issues which is yet to be heard and determined.”

The notice was in terms of section 20 of the Labour Relations Act, 2007.

5. The covering letter of the same date stated that the decision to refuse registration followed *‘consultations with the National Labour Board at the meeting, held on 18th September 2014.’*

6. The applicants also provided the Kenya Gazette dated 25th July 2014, in which the Registrar of Trade Unions notified members of the public vide Gazette Notice No. 5034 of the application by the appellant for registration. The Registrar notified the members of public to submit in writing any objections against the application within fourteen (14) days from the date of the publication of the Gazette.

7. The 2nd interested party lodged an objection to the registration and the Registrar notified the interim Secretary General Mr. Dennis A. Moturi of the development.

8. The Registrar notified Mr. Isaiah Kubai of the 2nd interested party and the appellant that the objection would be placed before the National Labour Board by a letter dated 7th August 2014.

9. The Appellants acknowledged receipt of the letter stating that it had not yet received copy of the objection raised by BIFU to allow it to usefully comment on it. The appellants warned that any reliance of any objection not served on it would amount to condemning the appellants unheard contrary to the rules of natural justice and relevant constitutional provisions.

10. The appellants also drew attention of the decision by Nduru J. in **Misc. Civil Appl. No. 1683 of 2004**, where BIFU sought to compel Kenya revenue Authority, the 1st interested party, to effect check off for members they purported to have recruited. The court refused the application stating:

“The respondent is certainly not a company. It does not carry on financial business The respondent is not such a financial institution and the officials from the Ministry of Labour and the registrar of Trade Unions cannot change its position of the law by directions that check off system be implemented, contrary to the law.”

11. The appellants pray that the appeal be allowed in line with the judgment of the court. On 3rd September 2014, the appellant wrote to the Registrar of Trade Unions in response to a letter from the Registrar dated 13th August 2014.

12. The appellants reiterated that the court has already pronounced itself on the 1st ground of objection. The ruling of the court delivered on 22nd September 2008 had not been set aside and ought to be obeyed.

13. That the names of the proposed union is not similar to BIFU and therefore section 14 (1) (f) of the Labour Relations Act 2007, does not apply.

14. Thirdly, any appeal pending does not extinguish any person’s right to exercise his/her constitutional right to form and participate in activities of their choice.

15. Finally, application for Tax Collectors’ Union (TCU) which was rejected on the basis of existence of KUCFAW was addressed by Ojwang J. in Misc. Appl. No. 534 of 2004. The Judge indicated KUCFAW had acted in bad faith in amending their constitution to register members from KRA. The same was declared null and void. The application before the registrar was different and distinct from the Tax Collectors’ Union, rejected by Ojwang J. and should have been allowed.

16. The appellants relying on the documentation submitted to the Registrar of Trade Unions pray that the appeal be allowed and the court directs the Registrar of Trade Unions to register the appellant union.

17. The 1st respondent filed submissions on 25th November 2015 stating that the respondents executed their duties in a fair manner and in compliance with the Labour Relations Act, and that they did not violate the appellants’ rights to association per the Constitution of Kenya.

18. The 2nd interested party filed memorandum of response to the appeal on 7th July 2015 with a bundle of documents in support thereof.

19. Both parties filed their respective submissions and the issues for determination are as follows;

- i. Whether the appellant’s application was in terms of the applicable law and procedure;
- ii. Whether the appellants were given a fair hearing before their application for registration was rejected;
- iii. Whether the reasons for rejection were sound in fact and law;

iv. Who should meet the costs of the suit.

Issue i

20. The Registrar of Trade unions did not raise any issue with the manner and form of the application by appellants. The court has considered the documentation filed by the appellants to the office of the registrar and is satisfied that the application was in compliance with provisions of sections 12, 13 and 14 (1) (a), (b) and (c) of the Labour Relations Act, 2007 in that the applicant union had recruited the requisite number of members had applied for, and obtained certificate from the registrar, the application was done within six (6) months of receiving a certificate issued by the Registrar, it had adopted a constitution that complies with the Labour Relations Act and had a registered office and postal address.

21. The court answers the first question in the affirmative.

Issue ii

22. With regard to whether the appellants were given a fair hearing before the application for registration was rejected by the Registrar of Trade Unions, the court notes that the appellant received the objections made to the application from the Registrar of Trade Unions and made written submissions to the registrar of Trade Unions before the matter was referred to the National Labour Board for advice to allow the registrar to make fair decision.

23. The issue of affording an applicant a fair hearing before rejecting an application for registration was considered by Maureen Onyango J. in the Industrial Court of **Kenya Appeal No. 2 of 2011, Munir Masound and 6 others –Vs- Registrar of Trade Unions and another** held;

“The Registrar had no obligation to go beyond his responsibility as set out in the Act to hear them. Nevertheless he sent all the objections to the registration to the appellants and asked for their comments.

They were thus given an opportunity to respond to the objections raised against their application for registration. In my opinion, this was a reasonable opportunity for the appellant to raise any issues they had before the decision was made. I therefore find that they were not denied an opportunity to be heard.”

24. The court agrees with the standard of due process set by Maureen J. herein above for the registrar in considering the application for registration of a union. It is sufficient that the Registrar;

- i. Publishes the intention to register a new union in a Gazette notice.
- ii. That the registrar invites members of the public to raise any objections to the intended registration.
- iii. That upon receipt of any objections, he notifies and serves copies of the objection to the applicant and allows the applicant to make written presentations on the objections.
- iv. That the Registrar submits the application, the objections and any representations to the objection to the National Labour Board for consideration in rendering the Board’s advice to him.
- v. That the application is dealt with timeously and the decision and reasons for the decision communicated to the applicant and the objectors (if any).

25. It is the court’s considered view on the facts of this case that the Registrar complied with these requirements. The applicant did not seek to personally appear before the Registrar for oral presentations and in the court’s view failure to hold oral hearing does not negate the process.

26. Issue two is answered in the affirmative.

27. Issue iii

As to whether the reasons for the rejection of registration were sound in fact and law, the court refers to the decision of Nduma J. in **Industrial Court Appeal Number 5 of 2012 between Seth Panyako and 5 others –Vs- the Attorney General & 4 others [2013] eKLR.**

28. The court considered the provisions of section 14 (1) (d) which reads;

“14 A trade union may apply for registration if –

(d) No other trade union already registered is –

(i) In the case of a trade union of employees, sufficiently representative of the whole or of a substantial proportion of the interest in respect of which the applicant seeks registration.”

Section 14 (2) is a proviso to the above as follows;

“Notwithstanding the provisions of subsection (1) (d), the Registrar may register a trade union consisting of persons working in more than one sector, if the Registrar is satisfied that the Constitution contains suitable provisions to protect and promote the respective sectoral interests of employees.”

The court in this respect held;

“Therefore in terms of section 14 (2) the Registrar in exercise of his discretion to register or not to had to consider the constitution of the union to determine if it contained suitable safeguards to protect and promote the respective sectoral interests of the employees.”

It appears the registrar did not exercise his mind on the requirement of section 14 (2) aforesaid.”

29. In the present matter, it is also not apparent from the notice of refusal to register that the registrar considered the sectoral requirement of Kenya Revenue Authority, which is a Government Agency vis a vis the constitution of the appellant and the inadequacy of BIFU as a union mainly covering financial institutions in the private sector.

30. The Registrar instead considered that the pendency of **Appeal No. 255 of 2010** challenging the findings of justice Dulu J. in the **Constitution Application No. 1683 of 2014 BIFU –Vs- Kenya revenue Authority** was sufficient reason, in addition to the fact that BIFU already operated in the financial sector as a whole, to deny registration of a sector specific union, the appellants to operate exclusively in the Kenya Revenue Authority.

31. Though, the mere existence of an appeal did not bar the Registrar from considering the fresh application, it was reasonable for the Registrar to take the matter into account together with other relevant factors.

32. Article 41 (2) of the Constitution of Kenya, 2010 provides *“Every worker has the right:-*

(c) to form, join or participate in the activities and programmes of trade union;”

33. The Registrar must consider this weighty provision in deciding whether to register or not to register a trade union.

34. The court in **Seth Panyako & 5 others (supra)** held;

“The inquiry to determine if the objectors to an application are:

Sufficiently representative of the whole or of a substantial proportion of the interest in respect of which the applicants seek registration, cannot be reasonably and fairly determined without giving opportunity to the applicants to make an input on the matter. After all, section 14 (2) provides an exception to that requirement upon an examination of the constitution of the applicants for suitable provisions to protect and promote the respective sectoral interests of the employees.”

35. However, the onus of proving that it had suitable provisions to protect and promote the respective sectoral interests of the employees it seeks to represent as opposed to the existing union rests on the applicant on a balance of probability.

36. The court has considered the representation made to the Registrar of Trade Unions by the appellants on 20th August 2014 and 3rd September 2014, in response to the objection made by BIFU to the application and the provisions of Article 11 of the Constitution of the 1st appellant and the court is of the considered view that the registrar of Trade Unions was not presented any peculiar sectoral advantage which the appellants were going to bring on board vis a vis the existing union BIFU. To this extent, the court is of the considered view that the Registrar under the advice of the National Labour Board, did not err, or act, contrary to the law in denying the appellant registration.

37. The refusal to register the new union was within the parameters provided by the law and did not violate constitutional rights of the appellants under Article 41 (2) (c) of the Constitution of Kenya, 2010.

38. Accordingly, the appeal lacks merit and same is dismissed with no order as to costs since it dealt with a matter of great public interest.

39. It should also not be lost to the parties that the pending appeal before the court of appeal will largely resolve this dispute one way or the other.

Dated and delivered at Nairobi this 25th day of November 2016

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE