



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT**

**AT MOMBASA**

**ELRCA NO. 3 OF 2016**

**RENSON NGOMA MTUNGU & 6 OTHERS.....CLAIMANTS**

**VS**

**REGISTRAR OF TRADE UNIONS.....RESPONDENT**

**THE TRANSPORT WORKERS UNION.....INTERESTED PARTY**

**(Being An Appeal From The Decision Of The Registrar Of Trade Unions Dated 21.4.2016)**

**JUDGMENT**

**Introduction**

1. The appellants are employees within the industry of Containers freights stations, Container terminals and Container Depots and they are also the promoters of a trade Union intended for workers the said industry. It is the appellants' case that they complied with the law when they applied for the registration of the Kenya Union of Container Freight Stations and Depots workers (KUCFSDW) on 14.7.2015 but they were shocked and dissatisfied by the respondent's decision of rejecting the application and lodged this appeal. The appeal seeks direction to compel the respondent to register the appellants union and forthwith issue certificate of registration.

2. The respondent has admitted that she received the application for registration of the said trade union from the appellants and notified the same to the public and invited objections from existing unions in the relevant industry through, the Kenya Gazette and one daily Newspaper as required by the law. In response she received objections from the Kenya Union of Export and Import Workers (KUEIW) and the Kenya Shipping Clearing and Warehouses Workers Union (KSCWWU) citing duplication of trade unions and likelihood of disharmony in the industry as the reason for their objection.

3. As required by the law the respondent forwarded both the application and the objections to the National Labour Board for advice and after consideration the Board advised her to reject the application because the workers in the industry were already substantially represented by the said objectors. She therefore pays for the dismissal of the appeal because the refusal to register the proposed union was proper and justified.

4. The objectors were never named as respondents and never appeared in this appeal but the Interested Party joined the respondent in opposing the appeal and objecting to the registration of the proposed union on grounds that the workers in the industry are already over represented and that registration of another union would lead to disharmony and competition for members. In her view the appellants and their

intended members should join the unions which are already registered in the industry. The appeal was disposed of by way of written submissions.

### **Appellants' case**

5. The appellants submitted that they exercised their right to organize and form a trade union under Article 36 (1) and 41 (1) (c) & (5) of the constitution, Section 4 (1)(a) of the Labour Relations Act (LRA) and the ILO Convention 87 and 98 by applying for the registration of the KUCFSDW as the union to represent them and other workers. To begin with, they obtained a Certificate for Recruitment from the respondent on 22.5.2015 and after recruiting members they lodged the formal application for the registration of the union in compliance with section 13 and 18 (1) of the LRA..

6. The appellants further submitted that they paid the relevant fees and a notice to the public and other trade unions was published in the Kenya gazette and the Star Newspaper in compliance with section 14 (1) (d) (ii) of the LRA. That only the KUEIW objected to the registration for the new union but the respondent replied to the objector that the industry for export and import did not cover the Container Freight Stations, Container Terminals and container depots. Consequently, according to the appellants the application for registration of their union fully complied with the law and it should have been refused.

7. In addition to the foregoing the appellants further submitted that the respondent erred in law when she sought advice from the National Labour Board on whether or not to register their union. According to the appellants, the Board is not an impartial advisor on that matter because it has part of its membership, General Secretaries of trade unions. According to the appellants, section 12 (1), 13, 14(2) and 18(1), (3) & (4) of LRA expressly vests the power to determine the fate of an intended trade union on the respondent only. They cited ***IC Appeal No. 10 of 2011, Kenya concrete, structural, ceramics tiles, woodplys and interior design workers union vs Kenya Building, Constructions, timber, Furniture and Allied industries Employees union*** in which Rika J faulted the Registrar of Trade Unions for failing to exercise his role independently, judiciously and fairly in denying the appellants registration of their union.

8. In conclusion, the appellants submitted that the constitution of their intended union was specific to the sector to be represented and which is not covered by the Interested Party's constitution. They further contended that the Interested Party's constitution is old, ambiguous and obsolete after many other trade unions sprung up from the sector and were registered. The said unions include, among others, Kenya Petroleum Workers Union, Kenya Long Distance Workers Union, Kenya Aviation Workers Union, Kenya Shipping, Clearing & forwarders union and Kenya Ferry Workers Union. The appellants urged that their new union should be registered because of the expansion of the container sector due to the expansion of the Kenya Ports Authority's container business.

### **Respondent's case**

9. The respondent submitted that section 14 (1) (d) (i) of the LRA allows a trade union to apply for registration only if there is no other union registered to sufficiently represent the whole or a substantial proportion of the interests in the sector. In that regard she submitted that the Container freight station, container terminals and depot companies are sufficiently represented by the KUEIW, KSCWWU and the Interested Party among others. She further submitted that the appellants have not proved that the employees engaged in the Container freight station, container terminals and depot companies are not sufficiently represented. She relied on ***Seth Panyako & 7 others Vs Registrar of Trade Unions [206]eKLR*** to contend that the burden of proof of insufficient representation lies on the applicant.

10. As regards the right to form, join or participate in union activities and programmes under Article 41 of the constitution, the respondent submitted that section 14 (1)(d)(i) of the LRA meets the test for limiting the said right set out by Article 24 of the constitution. Consequently, the respondent urged that there is justification to refuse registration of a trade union that is intended for a sector that is adequately represented. In this case the respondent submitted that the KUEIW and KSCWWU raised objection to the registration of the appellants' union and annexed excerpts of their constitutions which she considered and found that they sufficiently represented the employees in the sector. That before the rejection of the

application for registration the respondent gave a fair hearing to the appellant through written correspondence.

### **Interested Party's case**

11. The interested party submitted that the Containers freight stations and depots are sections of the transport companies which are adequately represented by her. That the name of the intended union is likely to cause confusion to the employees working in the transport industry within the meaning of section 12 and 14 of the LRA. That the appellants have failed to prove that they are engaged in the sector as required by section 14 of the Act. That the container freight stations is not a sector within the meaning of the law. In conclusion the interested party submitted that the appellants' freedom of association must be exercised subject to other people's freedom.

### **Analysis and Determination**

12. There is no dispute that the appellants made an application for the registration of the intended trade union to represent employees in the industry of Container Freight Stations, Container terminals and Container Depots. There is no dispute that other trade unions registered to represent employees in the industry raised objection to the registration of the new union on ground that the sector is already sufficiently represented by other unions including the objectors and the interested party. The issues for determination are :

- a. Whether the refusal to register the appellants' union was lawful and justified.**
- b. Whether the respondent erred in law by consulting the National labour Board instead of determining whether or not to register the new union independently.**
- c. Whether the reliefs sought should be granted.**

### **Refusal of register new union was lawful and justified**

13. The respondent contended that the refusal to register was justified because there are other trade unions registered to represent workers in the sector. That she reached the said decision after receiving objection and copies of the constitutions from the already registered unions in the sector and after consulting with the National Labour Board. The sector in issue is transport, freight, warehousing and or storage of import and export goods. There is no dispute that there are several unions already registered to represent all workers in the sector including the interested Party herein, KUEIW and KSCWWU.

14. After considering the evidence and the submissions presented to the court, I find that the appellants have not proved on a balance of probability that the workers intended to be represented by the proposed union are not sufficiently represented by the said trade unions that are already registered in the sector. Article 41 (2)( c ) of the constitution provides:

***“Every worker has a right to form, join, or participate in the activities and programs of a trade union.”***

15. The said right is however subject to the limitation established under Article 24 of the constitution which allows limitation of a right under the bill of rights through a statute only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom and after taking into account several factors including 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.

16. Section 14 of the LRA limits the said right under article 41 (2) (c) of the constitution without derogating from the spirit and letter of the freedom of association guaranteed by the said article 41 (2) (c). Section 14 (1)(d)(i) of the LRA provides that:

***“A trade union may apply for registration if no other union already registered is in case of a trade union...of employees is sufficiently representative of the whole or of a substantial proportion of the interests in respect of which the applicants seek registration.”***

17. The limitation set up by the foregoing provision is reasonable in a democratic society like ours and the refusal by the respondent to register the new union was justified because the sector is sufficiently represented by the unions already registered in the sector including the Interested party, Kenya Petroleum Workers Union, Kenya Long Distance Workers Union, Kenya Aviation Workers Union, Kenya Shipping, Clearing & forwarders union and Kenya Ferry Workers Union. I agree with the respondent and the interested Party that registration of the proposed union will create disharmony and unnecessary competition for members from the same sector. I there decline to reverse the decision to refuse registration of the proposed union by the respondent.

### **Seeking advice from the National Labour Board**

18. The contention by the appellants that the respondent erred by seeking advice from the National Labour Board instead of determining the application independently and impartially. In their view, the Board is not impartial Arbiter because its composition includes General Secretaries of trade unions who could be opposed to the registration of competing unions. Section 31 of the Labour Institutions Act (LIA) provides for the appointment of the registrar of trade unions who:

***“(1)... shall be responsible for the registration of trade unions.***

***(3) ... shall in exercise of his powers relating to the registration and regulation of trade unions, act on the advice of the board.”***

19. After considering the foregoing provision, I do not find any merits in the appellants’ contention that the respondent erred by seeking and acting on the advice from the National Labour Board. The respondent acted within the law when she sought the advice from the Board. In addition I find no merits in the said contention because the respondent never said that she refused to register the proposed union because she was bound by the advice from the Board.

### **Reliefs sought**

20. In view of the finding herein above that the respondent acted fairly and within the law in refusing to register the proposed union, I decline to grant the reliefs sought by the appellants. As a parting shot, I have to mention that the Trade Unions named as objectors during the application before the respondent ought to have enjoined as respondents or interested parties herein. That omission was wrong and prejudicial to the said objectors had the court allowed the appeal because they would have been condemned unheard.

### **Disposition**

21. For the reasons stated above, the appeal is dismissed with no orders as to costs.

**Signed, Dated and Delivered this 18<sup>th</sup> day of November, 2016**

**ONESMUS MAKAU**

**JUDGE**