



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

JUDICIAL REVIEW NO. 1 OF 2013

(Formerly NRB H.C. Judicial Review No. 439 of 2013)

AVIATION & AIRPORT SERVICES WORKERS UNION.....APPELLANT

VERSUS

REGISTRAR OF TRADE UNIONS.....1ST RESPONDENT

KENYA AVIATION WORKERS UNION.....2ND RESPONDENT

Mr. Robert Kubai Lichoro for appellant

Mr. Ojwang for the respondent

Mr. Okweh Achiando for the 2nd respondent

JUDGMENT

1. The appellant noted an appeal against the decision of the Registrar of Trade Unions made on 20th November, 2013, registering a new union in the Aviation Industry following a ruling of this court delivered on 11th June 2014 in which the court found that the appropriate method of attacking a decision of the Registrar of Trade Unions before the Employment and Labour Relations Court was by filing an appeal within thirty (30) days of the decision of the Registrar of Trade Unions in terms of section 30 of the Labour Relations Act which provides:

“Any person aggrieved by a decision of the Registrar made under this Act may appeal to the Industrial Court against that decision within thirty (30) days of the decision.”

It is important to note that in the amended papers the Registrar of Trade Unions and Kenya Aviation Workers Union are the 1st and 2nd respondents respectively.

2. The appeal was filed on 30th June 2014 and the grounds of appeal set out in the memorandum of appeal may be summarized as follows:

That the decision of the Registrar made on 20th November 2013 was made unprocedurally without approval and/or consultation with the National Labour Board in accordance with Section 19(1) of the Labour Relations Act 2007.

i. The decision was in contravention of section 14(1)d of the Labour Relations Act, as it was made

without due process.

ii. That the decision is meant to scuttle the appellant's membership and the respective union dues contrary to the appellants legitimate expectation.

iii. That the Registrar was aware at the time of the registration of the 2nd respondent that some of the officials of the 2nd respondent were members and officials of the appellant.

iv. That the appellant was in the process of negotiating collective bargaining agreements (CBA) with the employer and this registration was interfering with this process. That the appellant has existing CBA with the employer.

v. It is unlawful to register a trade union in a sector where another union exists and members in that sector are well represented without determining the simple majority.

iv. The registrar is forbidden to register a trade union with similar name to an existing one since this would cause confusion and mislead the members.

3. The appellant prays:

a. That the decision of the 1st respondent of 20th November 2013 registering the 2nd respondent be quashed and declared a nullity.

b. That the court do issue a mandatory order compelling the 1st respondent to deregister the 2nd respondent through gazettelement.

c. That the costs of the appeal be provided.

Response

4. The 2nd respondent opposes the appeal vide a replying affidavit of Moses Ndiema, the secretary general of the Kenya Aviation workers Union, the on the grounds that;

i. The court gave leave to the appellant to file an appeal within fourteen (14) days from 11th June 2014 because the time of filing an appeal from the Decision of the Registrar of Trade Unions had lapsed. The appeal ought to have been filed on or before 25th June 2014. The appeal was filed out of time on 30th June 2014 and same be struck off.

ii. The appellant did not seek further extension of time and the appeal is therefore incompetent. In any event extension of time ought to have been sought before expiry of the fourteen (14) days granted by the court.

iii. The appeal is fatally defective since the appellant did not participate in the proceedings before the Registrar vide a Gazette notice number 1274607 of 2013 issued and published on 6th September 2013 inviting objections of members of the public and specifically, the appellant on the registration of the 2nd respondent. The appellant failed to lodge an objection within the stipulated time and the Registrar proceeded with the process of registration.

The appellant delivered letter of objection on 24th September 2013 way after the deadline for submission of objections. The objection cannot be raised, now on appeal.

iv. No evidence has been tendered by the appellant on the allegation that the Registrar made his decision without advise of the National Labour Board. No approval is required by the registrar. He needs only consult the Board.

v. No new evidence may be presented to court on appeal without leave of court. All the grounds raised by the appellant ought to have been canvassed during the processing of the application, which did not happen and cannot be raised during the appeal. No decision was made on non-existent objections and therefore there is nothing to appeal against.

vi. The appeal ought to be on point of law only and not facts as the appellant has attempted to do.

vii. The decision appealed against has not been availed to the court for the court to examine it. The appellant makes reference to the decision but does not provide the same.

5. The 2nd respondent prays that the appeal is a complete abuse of the court process and ought to be dismissed with costs.

6. The registrar of Trade Unions filed a replying affidavit in answer to the appeal on 5th May 2014. The Registrar states that he received the application for certificate of recruitment of members by the 2nd respondent on 19th April 2013 in accordance with section 12 of the Labour Relations Act. The Registrar issued the 2nd respondent with the certificate of recruitment on 3rd May 2013.

7. The application for registration of the 2nd respondent was lodged on 10th May 2013 in accordance with sections 13, 14 and 18 of the Act.

8. That the Registrar published the application in the Kenya Gazette Notice No. 1274607 of 2013 inviting objections if any from the members of the public.

9. That upon being satisfied that the 2nd respondent had met the requirements and its members/officials were not similar with that of the appellant the registrar registered the 2nd respondent on 20th November 2013.

10. The Registrar states that he was bound by Article 41(1) and (2) of the Constitution which give every person right to fair labour practices and allows every worker to form, join or participate in the activities and programmes of a trade union. That he was also bound by Article 36 of the Constitution which gives every person freedom of association and requires that any application that requires registration of an association of any kind shall provide that (a) registration may not be withheld or withdrawn unreasonably

11. The Registrar finally deposes:

“That even though the registrar is required under section 31 (3) of the labour institutions Act to exercise his/her powers relating to registration and regulation of trade unions, to act in accordance with the advice of the Board, such advice are not mandatory.” Emphasis mine.

Submissions

12. The appellant filed written submissions in support of the Appeal attaching various authorities.

13. The submissions by and large support the positions taken in the appeal itself, and the various replying affidavits.

14. Determination

The issues for determination are as follows:

i. Whether the appeal is incompetent for having been filed out of time.

ii. Whether the decision by the Registrar of trade unions was a nullity for failure to obtain advice of the National Labour Board.

ii. Whether the Registrar of Trade unions erred in law by registering the 2nd respondent by reason of any of the grounds raised in the appeal.

Issue i

15. On the 9th July 2014, when the application accompanying the memorandum of appeal was mentioned before me, counsel for the 2nd respondent Mr. Okweh Achiando raised an objection that the appeal was filed after the fourteen (14) days set by the court in its ruling of 11th July 2014. The appeal was filed on 30th July 2014 slightly over fourteen (14) days from the date of the ruling. However, counsel for the respondent, Mr. Ojwang submitted that he had no objection to giving of directions on the Appeal. Counsel submitted further that article 159 of the Constitution of Kenya, 2010 disallows dismissal of matters on technicalities. Counsel Ojwang suggested that the court gives directions in respect of filing of responses to the memorandum of appeal. The court went ahead and made an order directing that responses to the memorandum of appeal be filed within fourteen (14) days and that the appeal be heard on 13th October 2014. The court further directed the Deputy Registrar of the court to give the matter an appeal number. With that the preliminary issues were settled. The court retains discretion to allow filing of an appeal out of time.

16. The court observed in its ruling of 11th July 2014 that the initial application in this matter was filed within the 30 days within which section 30 of the Labour Relations Act, allows filing of an appeal against the decision of registrar of Trade Unions. The court has considered the reason given by Mr. Bonne Nicholas Baraza in paragraph 3, 4 & 5 of the supporting affidavit to the application filed on 30th June 2014, seeking leave to have the appeal be admitted and it be placed before the trial judge for directions.

17. The applicant deponed that the advocate on record was out of the country and was not able to attend to the appeal timeously. That the applicant had appointed the current Advocate who has duly processed the appeal and filed it a few days late. That the few days delay was not prejudicial to the respondents.

18. The court having considered these grounds for delay exercised its discretion to admit the appeal outside the fourteen (14) days the court had granted the appellant on 11th July 2014. The appeal is therefore properly before court.

Issue ii

19. The other issue for consideration is whether the decision by the Registrar to register the 2nd respondent without seeking the advice of the National Labour Board rendered his decision a nullity.

20. The Registrar has boldly stated in the replying affidavit he filed that it was not mandatory to obtain the advice of the National Labour Board before taking a decision to or not to register a union.

21. The appellant has taken this point as a ground of appeal. The Registrar appears to concede that indeed he did not seek advice of the National Labour Board before making the decision to register the interested party.

22. Section 31 (3) of the Labour Institution Act, No. 12 of 2007 provides:

“The Registrar shall in exercise of his powers relating to registration and regulation of trade unions act on the advice of the Board.” (emphasis mine).

Whereas section 19 (1) of the Labour Relations Act, No. 14 of 2007 provides:

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

(emphasis mine).

23. It is important to note that two separate legislation emphasise the need for the registrar not to act alone in exercise of his powers to register or not to register a union. Justice Rika observed correctly in interpreting section 19 of LRA in the case of **Kenya Concrete, tiles, wood plys and interior designs Workers union vs. Edole and 2 others Industrial Court at Nairobi Appeal Number 10 of 2011, 2013 eKLR** as follows.

“although the law required the Registrar to consult the National Labour Board, the ultimate responsibility in registration of trade union vests in the registrar.”

24. Although the nature of the consultation and advice the Registrar must seek from the National Labour Board is not clarified by statute, it is in the court’s view imperative that the Registrar makes the decision to register or not to register a union only upon consulting the Board for the purpose of getting its considered opinion on the matter. Failure by the Registrar to do so renders his decision voidable.

25. The appellant has moved court challenging the decision of the Registrar which apparently was taken without consultation or advice of the Board.

26. From the facts before court, it is clear that the 2nd respondent sought registration in the same sector as the appellant. It is not in dispute that the two unions operate in the aviation industry and compete for the same employees for membership. It is also not in dispute that the appellant has a collective bargaining agreement with the employees in the sector and in particular Kenya Airways among others.

27. The court agrees with the appellants that the similarity in name between the appellant and the interested party has caused immense confusion in the sector.

28. In this respect, the court takes judicial notice of the number of disputes and cases filed before this court between the two unions since the registration of the 2nd respondent. The disputes range from who is the rightful union to represent employees of Kenya Airways Limited which is the major player in the sector to who should collect the agency fees from unionisable employees in the sector.

29. It is not far-fetched for the court to observe, and rightly so that the sector has not enjoyed Industrial peace due to the intense rivalry between the two unions and internal wrangles within each of the unions to the loss and detriment of the unionsable employees in the sector. Such are the matters that the National Labour Board is bound to consider and advice the Registrar upon before a new union is registered in a given sector.

30. Indeed section 7 (1) of the Labour Institution Act provides that:

“the functions of the Board are to advise the Minister on –

a. all matters concerning employment and labour

b.

c. any matter relating to Labour Relations and trade unionism;” interalia.

It should be noted that the Registrar of Trade Unions is domiciled in the Ministry for the time being in-charge of Employment and Labour matters and in fact, works under the Cabinet Secretary in-charge of Labour.

This mandate of the Board cannot be taken lightly and it is wrong for the Registrar to second guess the National Labour Board and avoid to consult or take advice from it before making an important decision such as the one he made to introduce a new union in the aviation sector without considering whether there was room for demarcation or not.

31. For these reasons, the court upholds the appeal and declares the decision by the Registrar of Trade Unions to register the 2nd respondent, Kenya Aviation workers' Union null and void.

32. The court has considered issues (ii) and (iii) together and finds that the appeal has merit and is accordingly upheld.

33. The final order of the court is as follows:

i. the decision of the 1st respondent, the Registrar of Trade Unions, of 20th November 2013 of registering the 2nd respondent is quashed and declared a nullity.

ii. the registrar of Trade Unions, the 1st respondent herein, is directed to deregister the 2nd respondent, Kenya Aviation workers' Union through Gazettement.

iii. each party to meet its own costs of the appeal.

Dated and delivered at Nairobi this 2nd day of December 2016

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE