



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

PET. NO. 10 OF 2014

FRANCIS W. NGARIUKI

ZAKAOYO CHEPKONGA

AMOS CHEPKWONY

DAVID MUSANGI BIKETI

SAMUEL MOSES KWEYU

PURITY WANJOGU

FRANCIS MWANZIA MAWEU

PURITY M. KURIA

DANIEL MUTUNGA KIMOTHO

GEORGE NGARI NDUNGU

JOHN KAERI

ZAKARIA J. MZEE

JOHN CHELIMO

BENJAMIN TELITEI

MOHAMED MUMIN YUSSUF

JANNET L. AYUA

KELLEN KAIMEI KIRIMI

ACTING AS THE INTERIM OFFICIALS

**AND PROPOERS OF THE PROPOSED PUBLIC SERVANTS UNION
PETITIONERS**

VERSUS

**THE REGISTRAR OF TRADE UNIONS 1ST
RESPONDENT**

**ATTORNEY GENERAL 2ND
RESPONDENT**

**THE UNION OF KENYA CIVIL SERVANTS
INTERESTED PARTY**

JUDGMENT

1. Promoters of the proposed Public Servants Union, filed this Application under certificate on 4th March 2014, seeking inter-alia:

i. a Conservatory Order restraining the Registrar of Trade Unions, the Respondent from withdrawing the certificate dated 21st November 2011 and issued to the Petitioners in accordance with **Section 12(1)** of the Labour Relations Act 2007 pending the hearing and determination of the Application and subsequently pending the hearing and determination of the suit.

2. At the exparte state, the Court did not grant interim orders but instead directed the Applicant to serve the Application and the Respondent to file a reply to the Application within 7 days and the Application be heard on 19th March 2014.

3. Meanwhile, on 19th March 2014, Public Servants Union, the existing Umbrella representing Public Servants applied to be joined as Interested Parties to the suit which Application was granted and the Interested Party was granted 14 days to file a response to the Application.

4. The Hon. Attorney General also joined the suit as the 2nd Respondent and filed a replying Affidavit on behalf of the 1st and 2nd Respondent on 16th May 2014. The Interested Party filed its Replying Affidavit on 2nd March 2014.

The Parties meanwhile agreed to dispose of the Petition by way of written submissions and dispense with the Application.

5. The Petitioner filed its written submissions on 2nd September 2014 and the 1st and 2nd Respondents filed their written submissions on 2nd September 2014 and the Interested Party filed its written submissions on 1st October 2014.

6. The chronology of filing is indicative of how a matter that was meant to be heard and disposed off on urgent basis, became protracted due to the time frames sought by the Parties to file pleadings and depositions in Court. However, the Application was dispensed with by the Parties and the Court is now dealing with the mention of the Petition itself.

Basis of the Petition

7. The Petitioners applied for a certificate for registration of the proposed Trade Union in 2011 in accordance with **Section 12** of the Labour Relations Act.

8. The 1st Respondent via a notice dated 21st November 2011 authorized the Petitioners to undertake lawful activities in order to establish a trade union.

9. The 1st Respondent via the said notice directed that the Application for registration of the Trade

Union be made to the 1st Respondent within six months from the date of the said letter.

10. The Petitioners made the formal Application for registration of the Public Servants Union on 21st December 2011, in accordance with the legal requirements.

11. The Petitioners attached to the Application the proposed Constitution of the Union, a list of names of the Promoters of the Union who included interim officers and members of the Union together with the minutes of the founding conference at which the resolution to form the Union was resolved.

12. The 1st Respondent received the Application with the annexures on 27th December 2011. In addition the Petitioners paid for the Application of registration of the Trade Union on the same date and received an official receipt thereof. The Statutory Application Forms for Application set out in the second schedule of the Labour Relations Act 2007, was filled and lodged.

In short all the formal requirements for Application of registration of the Union were met.

13. On 16th February 2012, the 1st Respondent, in compliance with the law published the Petitioners' Application in the Kenya Gazette on 10th February, 2012 under Gazette Notice No. 1566.

The purpose of the notice is to give various registered Trade Unions and Employer organizations or federations opportunity to submit in writing any objection against the proposed registration of a union within 14 days from the date of the Publication.

14. It is the Petitioners' case that, they have not received any response from the 1st Respondent regarding the Application for registration of the Union, up to the time of filing this suit. So the Petitioners do not know whether their Application was accepted or rejected more than two (2) years down the line.

15. That the 1st Respondent's conduct is contrary to **Article 36(1)** of the Constitution of Kenya, 2010 which provides;

“(1) every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.”

16. Furthermore, the 1st Respondent's conduct is contrary to **Article 36(3) (a) & (b)** of the Constitution of Kenya, 2010 which provides;

“(3) any legislation that requires the registration of an association of any kind shall provide that -

- a. registration may not be withheld or withdrawn unreasonably; and*
- b. there will be a right to have a fair hearing before the registration is cancelled.”*

17. Furthermore, the conduct of the 1st Respondent violates **Article 47(1)** of the Constitution that entitles the Petitioners to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

18. That the inordinate delay in making a decision violates the Petitioners right of receiving a written response and reason(s) for the refusal or otherwise to register the proposed Union.

19. Also, the Petitioners have pleaded that the conduct of the 1st Respondent not to communicate its decision is contrary to **Article 41(2)** of the Constitution which provides;

“every worker has the right –

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

20. That the Petitioners having met all the Legal requirement for the registration of the Union pray that;
- a. a declaration that the delay of over two years to make a decision to register or refuse registration of the proposed Public Servants Union is inordinate and is tantamount to refusal to register the proposed Union;
 - b. a declaration that the Petitioners rights under **Articles 36, 41** and **47** of the Constitution have been violated;
 - c. an injunction do issue restraining the 1st Respondent from revoking the proposed Union’s certificate to operate as a proposed Union;
 - d. The 1st Respondent be ordered to issue a certificate of registration to the Petitioners;
 - e. Costs of this Petition;
 - f. Any other or further relief that the Court may deem fit and just to grant.

Reply by the 1st and 2nd Respondents

21. The 1st and 2nd Respondents filed a Replying Affidavit deposed to by Elizabeth Gicheha, the Registrar of Trade Unions in the Ministry of Labour, Social Security and services on 15th May 2014.

22. She deposes that she is well versed with this matter and it is true the Petitioners lodged an application for registration of the proposed Union in 2011 as alleged.

23. It is also true, that the 1st Respondent pursuant to receipt of the Application through a certificate dated 21st November 2011, authorized the Petitioners to undertake lawful activities in order to establish a trade Union.

24. That the Interested Party filed its objection to the registration of the proposed Union on 20th January 2012.

25. That the 1st Respondent has not refused to register the proposed trade Union but that due legal process must be followed.

That she is advised by counsel on record which advice she verily believes to be true that **Section 31(3)** of the Labour Institutions Act, requires the Registrar of Trade Unions (her office) when exercising powers relating to the registration and regulations of trade unions, to act on the advice of the Board.

26. That the said Board is yet to convene in the next financial year as it involves many stakeholders.

27. That the Petitioners Application is one among other applications pending before the Board for consideration in the next meeting of the Board.

28. That the 1st Respondent will communicate the decision of the Board to the Petitioners once it meets and considers the Petitioners Application. That the 1st Respondent on its own cannot consider the Petitioners’ Application without the advice of the Board as is required by the law.

29. That this Petition has been filed prematurely and the Petitioners ought to await due process to be finalized. That the Petition be accordingly dismissed.

Reply by Interested Party

30. The Interested Party opposes the Petition vide a Replying Affidavit of Jerry S. Ole Kina, the 1st Deputy Secretary General of the Union of Kenya Civil Servants sworn on 2nd April 2014.

31. The gravamen of the opposition is as follows;

That the Interested Party is the properly constituted representative body competent to represent employees in the Civil Service excluding uniformed personnel in the Police Force, Prisons Department, Armed Forces, Administrative Police, National Youth Service, Teachers under the Teachers Service Commission and National Security Intelligence Service.

That as such, the Interested Party has always represented and continues to represent the interests of the Civil Servants.

32. That the Petitioners are disgruntled members of the Interested Party upon losing the elections of the Interested Party held in 2012.

33. That the Interested Party registered an objection raising fundamental issues with regard to the proposed registration of a rival union in the Civil Service. The letter of objection is annexed and marked 'JOK3'.

34. The nub of the objection is that;

- a. the proposed Union will be in direct competition with the Union of Kenya Civil Servants (UKCS) and it seeks to draw members from the same constituency;
- b. its registration will contravene **Section 4(1)(d)(f)** and **(i)** of the Labour Relations Act, 2007;
- c. the proposed Union, Public servants Union (PSU) has a name substantially similar to the Interested Party (UKCS) and its registration will cause confusion, anxiety and general misunderstanding among Civil Servants;
- d. all sponsors of the said Union are either losers or allies of candidates who contested and lost during the recent UKCS National Elections. The registration will set the new Union against the current Union and will set a dangerous precedent;
- e. the Interested Party was recognized by Government on 14th May 2004 but was founded in 1959 and is the right Union to represent the interests of employees in the Civil Service.

35. The Interested Party urges the Court to dismiss the Petition with costs.

Issues for determination

- i. was the Petition lodged prematurely?
- ii. has the 1st Respondent violated the rights of the Petitioners as set out in the Petition.
- iii. what remedy if any, is available to the Petitioners.

1st issue

36. It is common cause that the 1st Respondent has not considered the Application by the Petitioners for the registration of the proposed Union and has not therefore made a decision whether to register the proposed Union or not.

37. The 1st Respondent states that its hands are tied in the matter because it can only make a decision either way upon receiving advice from the National Labour Board in terms of **Section 7(1)** of the Labour Institutions Act which provides;

“7(1) the functions of the Board are to advise the Minister on-

(a) the registration, suspension and deregistration of trade unions and employees organisations.”

This provision is to be read with Section 31(3) of the same Act, which reads;

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

38. It is not in doubt that the Petitioners have complied with the procedural requirements in terms of **Section 18** of the Labour Relations Act, 2007 (LRA). Indeed the Respondents have not questioned the Application at all, the only issue being that the 1st Respondent awaits the Statutory Advice of the Board to allow the office of the 1st Respondent to make a final decision on the matter.

39. In this regard, **Section 19(1)** of the LRA, reads;

“if the Registrar is satisfied after consulting the Board, that a trade Union, that has applied for registration meets the requirements of the Act, the Registrar shall register that trade Union, and shall;

(a) issue a certificate of registration in Form B as set out in the second schedule;”

whereas under **Section 13** of IRA, a trade union is obliged to apply for registration within six months of receiving a certificate in terms of **Section 12** thereof, the Act, does not specify a time limit within which the Registrar should consider and issue a certificate of registration to the Applicant Union

40. Once the Registrar has issued a certificate, under **Section 12** to the Promoters, as was already issued to the Petitioners, the Registrar may only withdraw such a certificate for reasons set out under **Section 12(5)(a)** and **(b)** which reads;

“The Registrar may withdraw a certificate issued under this Section if the Registrar has reason to believe that –

- a. the certificate was obtained by fraud, misrepresentation, or as a result of a mistake;*
- b. any person has undertaken an unlawful activity whether in contravention of this Act or any other law, on behalf of the proposed Trade Union.”*

41. In *casu*, the Registrar has not indicated any intention to withdraw the certificate issued to the Petitioners for any reason or at all.

42. The Petitioners have not in the Petition itself alleged or detailed any follow up made by them to the 1st Respondent with a view to find out the reason for the delay in finalizing the matter and / or asking the 1st Respondent to expedite the processing of the Application.

43. Indeed, Mr. Francis W. Ngariuki in the Affidavit in support of the Petition speculates under paragraph 20, that there may be conspiracy between the Respondent and the Interested Party to deny the members of the proposed Union the right to join and participate in the affairs of a union of their choice. This speculation is not based on any tangible evidence produced before Court.

44. Whereas the Court is satisfied that a delay of more than two (2) years to finalise processing an Application for registration of a proposed union is inordinate and unreasonable, it is incumbent on the Petitioners to demonstrate they have taken reasonable steps to get the matter expedited. The Petitioners have failed to demonstrate any such effort on their part.

45. If indeed, a letter or letter(s) following up the matter were written to the 1st Respondent by the Petitioners, it would have come out, as has happened in these proceedings that it is indeed the National Labour Board and not the 1st Respondent who have failed and or neglected to perform their statutory advisory duties. It need not be gain said that the discharge of this statutory duty by the National Labour Board is a condition that must precede the decision by the 1st Respondent.

The National Labour Board is an independent statutory body that can sue and / or be sued.

46. In this regard, the Petitioners would have lobbied in the Board in this matter and / or in the relief sought so as to obtain an effective remedy from the Court.

47. The inescapable conclusion by the Court is that the Petitioners have prematurely brought this matter to Court since it is in the hands of the National Labour Board which is not party to this suit.

48. Any orders issued as against the 1st Respondent will be in vain as the office must await the decision of the Board.

49. Having said that, the 2nd Respondent is the Principal Legal Adviser to the Government and represents the National Government in Court and other proceedings where the National Government is a party in terms of **Article 156(4) (a) & (b)** of the Constitution of Kenya 2010.

50. In this regard and in terms of prayer (f) in the Petition, the Court having found that the delay in the finalizing this matter is inordinate and unreasonable directs the 2nd Respondent to ensure that the Application for registration by the proposed Public Servants Union is processed and an appropriate decision is made by the National Labour Board and the 1st Respondent within 30 days from the date of this judgment and file a report with this Court.

51. The Court finds no need at this stage to consider other issues raised in this matter.

The Petition therefore only succeeds in this respect.

The Respondents to pay the costs of the suit.

Dated at Nairobi this 23rd day of April, 2015.

MATHEWS N. NDUMA

PRINCIPAL JUDGE

Delivered by Hon. Wasilwa on 24th day of April, 2015.

In the presence of