



REPUBLIC OF KENYA

EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 61 OF 2014

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE FREEDOM OF
ASSOCIATION UNDER ARTICLE 36 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF LABOUR RIGHTS UNDER
ARTICLE 41 OF THE CONSTITUTION OF KENYA AND PART II SECTION 4 OF THE
LABOUR RELATIONS ACT 2007**

BETWEEN

WESLEY TOMNO,

JAMILLA WAMWIRI,

SALOME MWAURA,

MOSES C. O. LORRE,

GLADWELL CHERUIYOT

ALEX KIPSUMBAI,

FREDERICK OMIAH,

DORIS KARIMI,

ANTHONY MAMATI,

YVONNE WAMBUA,

ACTING AS THE INTERIM OFFICIALS &

PROPOSERS OF THE KENYA HEALTH

PROFESSIONALS UNION (KHPU).....PETITIONERS

VERSUS

REGISTRAR OF TRADE UNIONS.....RESPONDENT

KENYA UNION OF DOMESTIC,

HOTELS, EDUCATIONAL INSTITUTIONS

AND HOSPITAL WORKERS UNION (KUDHEIHA).....INTERESTED PARTY

RULING

1. The Petitioners through the notice of motion dated 26th September 2014, brought under Rules 13, 19 and 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013; Sections 4, 12, 14, 18 and 20 of the Labour Relations Act of 2007; Section 12(3) of the Industrial Court Act 2011; Rule 16(3) of the Industrial Court (Procedure) Rules 2010, seeks an order for the grant of mandatory orders compelling the Respondent to register the applicant/petitioner Kenya Health Professionals Union pursuant to its application and to issue them with a certificate of registration. The application was premised on grounds on the face of it as well as the affidavit of Moses C. O. Lorre sworn in support. The applicant stated that the Petitioners had complied with the requirements for the registration of a trade union and had submitted a duly approved constitution in accordance with the law, recruited members and that the Petitioners' interests under the Constitution of Kenya and the Labour Relations Act were being violated by the Respondent.
2. The Respondent gave notice of a preliminary objection on the 12th November 2014. In the preliminary objection, the Respondent stated that the Petition is incompetent, misconceived and bad in law; the Petitioners have never applied for registration of the proposed trade union as required under Section 13 and 14 of the Labour Relations Act, 2007; that it is in contravention of the express provisions of Section 30 of the Labour Relations Act.
3. The parties proposed that the Court determine the application and consider the preliminary objection as part of the response to the application. The Interested Party did not file any papers.
4. The prayers sought in the motion were in the main spent at the time of the application save for the order sought for the grant of mandatory orders compelling the Respondent to register the applicant/petitioner Kenya Health Professionals Union.
5. Mrs. Manyariki for the Petitioners submitted that the application was brought while the application for registration was pending before the Registrar of Trade Unions and that way after the application had been filed, the Petitioners were served with a decision dismissing the application for registration. The Constitution of Kenya Article 36(1) provides the right to form, join or participate in association of any kind. Sub-section 3(a) of the Labour Relations Act states that the Registrar should not withhold or withdraw registration arbitrarily. She submitted that the grounds given by the Registrar is that there is already in existence an existing trade union which caters for the interests of the Petitioners and cited the Interested Party. The Interested Party had not filed any documents to stop the registration or oppose the application. The proposed union is for health officials who are private practitioners. She stated that the Interested Party is taking care of health workers and there is this group which has been left out. The doctors and nurses have registered their unions. She submitted that the lab technicians, dentists, orthopedics and public health officers had been left out. It was her view that the medical professionals had been left out without a trade union and that the Petitioners should not be unreasonably denied the opportunity to have a trade union. The Petitioners submitted through counsel that they had complied with all the requirements – all the necessary documents were supplied as provided for in the Act, fees paid, list of proposed members, the constitution and list of officers available. She submitted that if the Petitioners are not registered there would be no union which will address their interests. She submitted that there is no union with a similar name that has been registered by the Registrar of Trade Unions. The purpose is to pursue lawful activities as provided in law.

6. The Respondent objected to the issuance of the orders and submitted through Miss Kassim that the orders sought are final and not interim. She stated that should the Court be inclined to grant the orders then it would mean the Petition has been determined by way of an application. She further submitted that upon the lodging of the application for registration, the Petitioners were informed that there would be a consideration by the Labour Board which sat in September 2014 and made a decision to refuse registration. The notification of refusal was issued to the Petitioners and the notification set out 2 major grounds for refusal. Firstly that the Interested Party represents other professionals excluding doctors those who work in nursing homes, chemists, pharmacists, research and research institutions. The Kenya Union of Nurses covers nurses and the doctors are covered under the Kenya Medical Practitioners, Pharmacists and Dentists Union. She submitted that the Petitioners had failed to attach the notification of refusal and that he who comes to equity must do so with clean hands and thus the Petitioners were not deserving of the Court's kind eye.
7. In a brief reprise Mrs. Manyarkiy submitted that the Petitioners had come to Court with clean hands and they had made disclosures and submitted documents within their reach. It was her submission that the allegations on withholding of information were not true and that the document now produced on registration refusal had been in the custody of the Respondent since September 2014 and was not produced until counsel was submitting from the bar. She submitted that the doctors have their union, the nurses have their union and where does that leave others? She opined that no prejudice will be suffered if the Petitioner is registered.
8. Under ILO Convention 87 Freedom of Association and Protection of the Right to Organise, 1948, the rights of workers and employers to organise are recognised. The Petitioner asserts that the refusal to register was in contravention of the Constitution of Kenya Article 36 and 41. Article 36 and 41 provide as follows:-
 - 36.(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.
 2. A person shall not be compelled to join an association of any kind
 3. Any legislation that requires registration of an association of any kind shall provide that—
 - (a) registration may not be withheld or withdrawn unreasonably; and
 - (b) there shall be a right to have a fair hearing before a registration is cancelled.
 41. (1) Every person has the right to fair labour practices.
 - (2) Every worker has the right—?
 - (a) to fair remuneration;?
 - (b) to reasonable working conditions; ?
 - (c) to form, join or participate in the activities and programmes of a trade union; and
 - (d) to go on strike.?
 - (3) Every employer has the right—
 - (a) to form and join an employers organisation; and
 - (b) to participate in the activities and programmes of an employers organisation.?
 - (4) Every trade union and every employers' organisation has the right—

(a) to determine its own administration, programmes and activities;?

(b) to organise; and?

(c) to form and join a federation.?

(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining.

9. The Petitioner seeks the registration of the proposed trade union to be known as the Kenya Health Professionals Union. The Constitution as well the ILO Convention 87 make provision for the organisation of labour and capital. Article 2 of Convention 87 provides that workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organisations of their own choosing without previous authorisation. Workers and employers clearly have a right to establish organisations to defend their interests. The expression 'without distinction whatsoever' that is contained in Article 2 is used to mean that freedom of association should be guaranteed to all workers and employers without discrimination of any kind such as that based on occupation, colour, race, religion, gender, beliefs, nationality or even political opinions.

10. The salutary provisions in international conventions at times do find expression in municipal law. Kenya has the Labour Relations Act 2007 which recognizes these rights enshrined in Convention 87. There are steps set out in the law on registration. Section 4(1) of the Act provides as follows:-

4. (1) Every employee has the right to -

(a) participate in forming a trade union of federation of trade unions; ?

(b) join a trade union; or ?

(c) leave a trade union. ?

11. Part III of the Labour Relations Act sets out in detail the process of forming a trade union and identifies the markers. In order to begin recruiting membership, one must have a certificate under Section 12 of the Act. Section 14 and 19 have provisions of interest to the Petitioners.

14.(1) A trade union may apply for registration if?

(a) the trade union has applied for registration in accordance with this Act; ?

(b) the trade union has adopted a constitution that complies with the requirements of this Act, including the requirements set out in the First Schedule; ?

(c) the trade union has an office and postal address within Kenya; ?

(d) no other trade union already registered is-?

(i) in the case of a trade union of employers or of employees, sufficiently representative of the whole or of a substantial proportion of the interests in respect of which the applicants seek registration; or

(ii) in the case of an association of trade unions, sufficiently representative of the whole or a substantial proportion of the trade unions eligible for membership thereof:

Provided that the Registrar shall, by notice in the Gazette and in one national daily newspaper with wide circulation, notify any registered trade union, federation of trade

unions or employers' organisation which appear to him to represent the same interest as the applicants of the receipt of such application and shall invite the registered trade union federation of trade unions or employers' organisation concerned to submit in writing, within a period to be specified in the notice, any objections to the registration;

.....

2) 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 the employees.

19. (1) If the Registrar is satisfied, after consulting the Board, that a trade union, employers' organisation or federation that has applied for registration meets the requirements of the Act, the Registrar shall register that trade union, employers organisation or federation.

12. The law thus provides safeguards against duplicity and unnecessary overlap. There is the Kenya Union of Domestic, Hotels, Educational Institutions and Hospital Workers Union (KUDHEIHA); the Kenya National Union of Nurses (KNUN); the Kenya Medical Practitioners, Pharmacists and Dentists Union (KMPPDU). The Petitioners assert that the Kenya Health Professionals Union will represent the interests of lab technicians, dentists, orthopedics and public health officers and health officials who are private practitioners. The Respondent asserts that the intended union is in contravention of Section 13 of the Labour Relations Act. Section 13 provides as follows:-

13. A trade union or employers' organisation shall apply to the Registrar for registration within six months of receiving a certificate issued under section 12.

13. The Respondent was duty bound to demonstrate how the Petitioners had defaulted in compliance with the provisions of Section 13. Nothing much turned on Section 30 of the Labour Relations Act. What is important is the import of the proviso to Section 14. Where it appears to the Registrar that the intended trade unions represent the same interest as existing trade unions the Registrar shall on receipt of such application invite the registered trade union, federation of trade unions or employers' organisation concerned to submit in writing any objections they may have to the registration. The Registrar is also required to seek the decision of the Labour Board prior to making the decision. The Respondent suggests that this was not done until late 2014 hence the delay in responding to the Petitioners. The small matter of delay notwithstanding, was the refusal to register the intended union justifiable in an open and democratic society which abides by international norms?

14. The ILO Convention sets the bar, the municipal law of Kenya brings it to life. The union that the Petitioners propose is one that would be superfluous or surplus to requirements. The health professionals who are proposed members of the Respondent are already catered for in the existing trade unions. If that were not so, each craft would have a union. There is therefore justification to refuse registration of a union that is intended for a sector that is adequately represented. The upshot of the foregoing is that the application has no merit and is dismissed with costs to the Respondent.

Orders accordingly.

Dated and delivered at Nairobi this 29th day of July 2015

Nzioki wa Makau

JUDGE