



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

APPEAL NUMBER 18 OF 2014

CHARLES SALANO & 9 OTHERS.....CLAIMANT

VERSUS

THE REGISTRAR OF TRADE UNIONS.....RESPONDENT

FOOD AND ALLIED WORKERS UNION.....INTERESTED PARTY

JUDGMENT

1. The appellants in this appeal are the promoters of yet to be registered union called Kenya Supermarkets Workers Union (KESMWU). The appeal related to refusal by the Registrar of Trade Unions to register the proposed Union as a trade Union. The appeal was based on grounds among others:-
- a. That the Registrar of Trade Unions, the Respondent herein erred in law and in fact and made an unlawful, illegal and unconstitutional decision on 3rd November, 2014 by denying the Appellants a “**Certificate of Establishment**” of a trade union in disregard of the express provisions of Article 36 of the Constitution of Kenya.
 - b. That the Respondent herein erred in law and in fact and made an unlawful, illegal and unconstitutional decision dated 3rd November, 2014, without the due regard to Article 41 of the Constitution of Kenya.
 - (c) That the Respondent herein erred in law and in fact and made an unlawful illegal and unconstitutional decision dated 3rd November, 2014 in utter contravention of the provisions of section 12 and 13 of the Labour Relations Act No. 14 of 2007, laws of Kenya.
 - (d) That the Appellants herein contend that it is only after they had duly complied in making an application to register a trade union under the section 13 and 14 of the labour Relations Act. No. 14 of 2007, Laws of Kenya, that the Respondent was entitled to invite any trade union to raise an objection more so and specifically only after having comprehensively exhausted the mandatory requirements of the last paragraph of section 14 (1) (d)

“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 union or employers’ organization 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' organization concerned to submit in writing, within a period to be specified in the notice, any objections to the registration."

(e) That the name of the proposed trade union is not in any form or manner the same as that of an existing trade union or sufficiently similar, so as to cause confusion that may have driven the Registrar of Trade Union to otherwise form a negative opinion towards the promoters of the Kenya Supermarkets Workers Union which union is a **"Specialized Sectoral Industrial Trade Union"** and that therefore, the Respondent's decision to deny the Appellants Registration was Null and Void ab initio.

(f) That the Registrar of Trade Unions fragrantly erred in law and in fact dealing with and having her decision clouded with the concerns of the Kenya Union of Commercial Food and Allied Workers, before first publishing a Notice in the Kenya Gazette and in a National daily newspapers with wide circulation as required under section 14 of the Labour Relations Act No. 14 of 2007.

2. The respondent entered appearance to the appeal through the Attorney General and filed a reply affidavit sworn by Elizabeth Gicheha, who stated that she was the Registrar of Trade Union she depones in the main:-

- a. That she is the registrar of trade unions and competent to swear this affidavit.
- b. That on 13th October, 2014, the appellants applied for a Certificate of Recruitment for purposes of establishing a trade union.
- c. That her office is responsible for registration and regulation of all trade unions federations of trade unions and employers organizations.
- d. That the scope of representation by the appellant is already covered by existing union – Kenya Union of Commercial Food and Allied Workers.
- e. That the registration of the appellants would amount to duplication and proliferation of unions in one sector which does not augur well for industrial harmony.
- f. That the exercise of discretion by the Respondent to refuse registration of the appellants is consistent with the provisions of the constitution and the Labour Relations Actions.
- g. That the respondent avers that the sector the appellants intends to represent is sufficiently represented by the Kenya Union of Commercial food and Allied Workers and issuing a certificate to the appellants will interfere with peaceful industrial relations existing since both unions will compete for members.
- h. That her advocate further advises her which information she finds to be true that the Labour Relations Act section 14(1) (d) provides that a trade union may apply for registration if no other trade union already registered is sufficiently represented by the whole or a substantial proportion of the interest in respect of which the applicants seek registration.

3. Kenya Union of Commercial Food and Allied Workers Union joined this appeal as interested party and filed a replying affidavit through Mr. Boniface Kavuvi who stated that he was the Secretary General of the Union. He deponed on the main:-

- a. That under the membership clause of his Union's constitution it is entitled to represent all employees engaged or employed in supermarkets, shops retail and wholesale outlets, distribution and supply companies among others.
- b. That the interested party has recruited and represents employees from the various supermarkets

who are members of the union.

- c. That the Appellants through persons who were litigating on their behalf had filed before this Honourable Court another appeal being Appeal No. 3 of 2014; *Laban Mokua & Others vs. Registrar of Trade Union and the Kenya Union of Commercial, Food and Allied Workers* which appeal was struck out.
- d. That the appellants have never appealed the ruling of the Honourable Court but instead filed another application before the Registrar of Trade Unions and subsequently filed the present appeal.
- e. That David O. Odunga and Hillary U Mutuli, the 7th and 8th Claimants herein were Chairman and Secretary to the Central Staff Committee of the union and participated in negotiations of Collective Bargaining Agreement in September, 2014.
- f. That in the circumstances there is no vacuum in Trade Union representation in the Supermarket Industry as the Interested Party is sufficiently representative of all employees the Appellants seek to represent.

4. Section 12(3) of the Labour Relations Act gives the Registrar the discretion to accept or refuse to issue a certificate to a proposed trade union. The certificate can be refused if the application is defective or the name of the proposed trade union or employers' organization is the same as that of an existing union or employers' organization or is sufficiently similar so as to mislead or cause confusion. Further section 14(1) (d) of the said Act further provides that a Union may be registered if no other trade union already registered is sufficiently representative of the whole or substantial proportion of the interests in respect of which the applicants seek registration. The Registrar became of the view that the interest sought to be represented by the appellant is sufficiently represented by the Interested Party. The Registrar therefore felt that to accede to the appellants request would mislead or cause confusion.

5. Mr. Boniface Kavuvi in his affidavit in opposition to the appeal has stated that the Interested Party's Constitution clearly states that it was entitled to represent employees engaged or employed in supermarkets, shops retail and wholesale outlets. He further stated that all the appellants have at one time or the other been represented by the Interested Party in disputes with their employer – Nakumatt. The appellants did not deny these allegations.

6. Trade Union movement is concerned with protection of workers and employers rights as a collective. This right is protected under article 41 of the Constitution, International Laws and ILO Conventions. The right however is not absolute. It can be regulated or limited in context of article 24 of the Constitution. That is, such regulation or limitation must be seen in the context of what is permissible in an open and democratic society. Therefore in so far as the right to join, leave or form a trade union of one's choice goes, no union can be registered if there is already in existence a union which sufficiently represents the interest of the workers or employers sought to be represented by the new union. The application was submitted to the Registrar. She had the benefit of looking at the entire application together with documents in support and became of the view that the interest sought to be represented by the appellant was already sufficiently represented by the interested party.

7. Further, the interested party has sufficiently shown that by its constitution it represents supermarkets workers and has indeed previously represented the promoters of the proposed union against their employer Nakumatt. It therefore behove the appellant to demonstrate that over the years supermarket workers have become so specialized or disadvantaged to a point where it may reasonably be said that the interested party no longer sufficiently represents them. Whereas no union can claim monopoly over workers representation, for the sake of order and harmony in industrial relations, duplicity in representation should be avoided.

8. The Court is therefore of the view that the Registrar reasonably exercised her discretion in refusing to issue the appellant with a certificate because she was persuaded the interested party already sufficiently represented the interest of the workers sought to be represented by the appellant.

9. The Court will therefore not disturb the Registrar's decision with the consequence that the appeal is hereby dismissed with costs.

10. It is so ordered.

Dated at Nairobi this 20th day of November 2015

Abuodha J. N.

Judge

Delivered this 20th day of November 2015

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge