



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT AT NAIROBI**

**APPEAL NUMBER 1 OF 2011**

**BETWEEN**

**1. JAPHETH ANYIRA AGURA**

**2. MATHEW CHERUYIOT**

**3. MARY TOTO EMOJONG**

**4. TIMOTHY OSIRU OKATA**

**5. VIOLET KADOGO MUKANGAI**

**6. JANE WAIRIMU KABUTHIA**

**7. ESTON KIDIGA ADAMBI**

**[Appealing as the promoters Of KENYA UNION OF EMPLOYEES OF POLYTECHNICS,  
COLLEGES AND ALLIED INSTITUTIONS [KUEPCAI]..... APPELLANTS**

**VERSUS**

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

**AND**

**THE KENYA UNION OF DOMESTIC, HOTELS, EDUCATION INSTITUTIONS, HOSPITALS  
AND**

**ALLIED WORKERS [KUDHEIHA] .....INTERESTED PARTY**

***Rika J***

***CC. Leah Muthaka***

***Mr. Enonda instructed by Enonda, Mak'Oloo, Makori & Company Advocates for the Appellants***

***The Registrar of Trade Unions Mr. Langat, for the Respondent***

***Mr. Mwari Stefano Njiru Industrial Relations Officer for the Interested Party***

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## JUDGMENT

1. This is the Judgment of the Court in this Appeal brought by the Appellants, against the decision of the Registrar of Trade Unions declining to register their Trade Union. The Notification of Refusal of Registration is dated 10<sup>th</sup> December 2010.

2. The Parties filed their respective records and were substantively heard before my brother Judge Stephen Radido on 25<sup>th</sup> September 2012 and 23<sup>rd</sup> October 2012. Judgment was reserved for 14<sup>th</sup> December 2012. On this date the Court realized there was an application by the Appellants seeking to amend the Memorandum of Appeal to include the individual names of the Appellants, rather than the plain name of their Trade Union. It was ordered that the proceedings that had taken place in prosecuting and responding to the Appeal, be vacated and the application for amendment of the Memorandum of Appeal be heard first. The Parties subsequently moved the Appeal before the present Judge, and agreed on 15<sup>th</sup> April 2013, to have the application for amendment allowed the proceedings of 25<sup>th</sup> September 2012 and 23<sup>rd</sup> October 2013 reinstated. Parties agreed on 4<sup>th</sup> June 2013, that the Court proceeds to give its Judgment on notice. It is rather unfortunate that the Parties have had to wait for the Judgment for longer than necessary on the ground that the Appellants overlooked the application seeking to have the promoters joined to the proceedings. It would have assisted the Court considerably, and facilitated expeditious administration of justice, if consent entered into after the Court gave its ruling of 14<sup>th</sup> December 2012, had been entered before or during the hearing of 25<sup>th</sup> September 2012 and 23<sup>rd</sup> October 2012.

3. Relying on the legibly recorded proceedings before Judge Radido, and the Records filed by the respective parties together with the oral submissions, the Court understands the respective positions to be:-

- a. KUEPCAI applied for registration on 26<sup>th</sup> February 2008. The Respondent advised the Appellants on 28<sup>th</sup> March 2008, that the Appellants provide him further information on their application before the Respondent considered issuing the provisional certificate. Such information was necessary because the Respondent was aware there were two other Trade Unions, the Interested Party herein and the Kenya Union of Post Primary Teachers [KUPPET], with Members from the same area sought to be represented by KUEPCAI.
- b. The Appellants wrote on 3<sup>rd</sup> April 2008, forwarding more information on their Trade Union to the Respondent. Their Trade Union would be limited to Non-Teaching staff of the Institutions named in their Constitution. KUPPET represents the Teaching cadre, and there would be conflict with KUPPET. As for KUDHEIHA, it was explained by the Appellants that the interests represented by KUDHEIHA are intractable. They relied on the decision of *the High Court at Nairobi H.C.C.C. Number 10 of 1999 Elijah Musembi and Others v. Registrar of Trade Unions* in urging the Registrar to find KUDHEIHA an amorphous Trade Union, representing nebulous trade union interests.
- c. This explanation appears to have persuaded the Respondent to issue the Appellants the provisional certificate on 23<sup>rd</sup> April 2008.
- d. The Respondent invited objections on the registration of KUEPCAI, in Gazette Notice Number 2875 of 19<sup>th</sup> March 2010. KUDHEIHA formally objected to the registration of KUEPCAI, and the objection was communicated to the Appellants by the Respondent, in a letter dated 1<sup>st</sup> April 2010. The Appellants responded to the objection, revolving their arguments around the same grounds they had communicated to the Respondent, on the Respondent's request for further information revolving around the provisional certificate.

- e. The Respondent was this time not persuaded to disregard objection. In the notification subject matter of the Appeal dated 10<sup>th</sup> December 2010, the Respondent declined registration, giving the ground for refusal as:-
  - There are already registered Trade Unions, sufficiently representative of the whole or substantial proportion of the interests in respect of which the applicants have sought registration namely: KUDHEIHA and KUPPET.

4. In his submissions, the Respondent restated the existence of KUDHEIHA and KUPPET as the reason why he exercised his discretion to the Appellants' disfavour. Section 14 of the Labour Relations Act requires Trade Unions are registered based on sector or membership. The Appellants did not provide details of their employment or occupation. The promoters of KUEPCAI did not lay a basis to claim workers' rights under the Constitution of Kenya. Between 22<sup>nd</sup> October 2008 and 10<sup>th</sup> December 2010, they did not recruit any employees of the Institutions they intend to represent. It was incumbent upon them to show KUDHEIHA and KUPPET are not adequately representative of their Members.

5. Mr. Njiru submitted that KUDHEIHA has recognition agreements with various Polytechnics. They have concluded several collective bargaining agreements with these Institutions. Most of the Institutions are implementing the CBAs concluded between KUDHEIHA and themselves. Registration of the new Trade Union would destabilize industrial harmony. Non-teaching staff of Educational Institutions are Members of KUDHEIHA. The Interested Party also feels that Registration of KUEPCAI must be denied, because the name KUEPCAI is similar to KUDHEIHA.

#### *The Court Finds and Orders-*

6. The last point taken up by Mr. Njiru on the similarity of names does not appear to this Court to have weight. Section 4 of the Labour Relations bars registration of two Trade Unions with the same or sufficiently similar names, on the ground that such names would confuse Membership. KUDHEIHA and KUEPCAI are not names that would confuse any Members. The long and abbreviated names of the Appellants' Union sound to this Court clearly distinguishable, from other Trade Union names. This objection is rejected.

7. The drawing in of KUPPET by the Registrar of Trade Unions in justifying his decision seems inappropriate considering that there was no objection at any stage, presented by KUPPET. The Court has not found any such objection at the point KUEPCAI sought the provisional certificate, and eventually when the formal objections were invited through the Gazette Notice published by the Respondent. How would the Registrar tell employees of the Institutions sought to be represented by KUEPCAI, are sufficiently represented by KUPPET? The purpose of inviting objections publicly is meant to assist the Registrar, in determining if proposed trade union registration would conflict with the interests sufficiently represented by another Trade Union, resulting in demarcation disputes and industrial disharmony. In the absence of objections filed with the Registrar, he has no reason to scour his Registry for constitutions of the various Trade Unions which have not lodged any objection, with the intention of assessing if they are sufficiently representative. The consideration of the application must be limited to the Trade Unions which have specifically made their objections known formally in written reaction to the invitation made in the Gazette Notice. The Respondent should therefore have confined his enquiry to the views of KUDHEIHA.

8. KUDHEIHA is one of the oldest Trade Unions in Kenya. It is also one of the Trade Unions with a colossal area of representation. It is in Hotels, Education Institutions, Hospitals, Religious Institutions and People's Homes. Its wide reaching constitution enables it, to recruit in all areas of the Kenyan economy. The Interested Party represents waiters serving in hotels, as well as house girls in our Homes. It represents non-teaching staff in education institutions and until recently, nurses. It has had very convoluted demarcation disputes with the Hotel Workers' Union. As stated by this Court in ***Appeal Number 1 of 2010, Patrick Olenda and 6 Others v. the Registrar of Trade Unions and Another***, "there can be no justification for trade unions to control, or wish to control, entire sectors of the economy from the foundation to the roof." The structure of KUDHEIHA is such as that it enables the Interested Party to

bestride the Labour Market like a colossus. This has been suggested in earlier decisions, particularly in ***H.C.C.C Number 10 of 1999*** cited by the Appellants above, where it was said KUDHEIHA's constitution is nebulous. Unfortunately KUDHEIHA has not amended its constitution to bring it to conform to the thinking of a succession of judicial opinions, focusing on a main area of representation, opting instead to fervently defend its multiple turfs, whenever a dispute arises.

9. In the view of this Court, generalist trade unions cannot claim to be sufficiently representative of any area they claim to represent. It is presumed that Members are recruited and organized around the theme of 'community of interests.' There is no 'community of interests' amongst nurses, domestic servants, waiters and priests, seen together as a unit, and it is hard to see how KUDHEIHA would be sufficiently representative of any of them. Trade Unions, unless in the mould of Federation of Trade Unions, are organized with specific orientation. It is not possible for Trade Unions to espouse a generalist orientation, and expect the Court to uphold the assertion that such Trade Unions can be sufficiently representative.

10. The constitution of KUEPCAI confines its trade union activities to the non-teaching staff of Polytechnics, Colleges and Allied Institutions. It is conceded KUDHEIHA is currently representing some Polytechnics. But as suggested in this Judgment above, representation cannot be described as sufficient within the understanding of the law, because KUDHEIHA is actively representing a multiplicity of other industries, with little or no 'community of interest.' It is also not true that the Appellants did not establish their occupations or professions as submitted by the Respondent; the Court has examined their list 'C' and noted their occupations and Institutional Addresses are given.

11. The Court has arrived at the decision that there was no objection raised by KUPPET; objection by KUDHEIHA was misplaced; KUEPCAI has a definite and clearly demarcated area of representation; and is entitled to registration under the Labour Relations Act, grounded on the inalienable, associational labour rights, given in the Constitution of Kenya. It is regrettable the registration has not taken place almost 6 years after the application. IT IS ORDERED-:

- a. ***The Appeal is allowed;***
- b. ***Kenya Union of Employees of Polytechnics, Colleges and Allied Institutions [KUEPCAI] is hereby granted registration as a Trade Union;***
- c. ***The Registrar of Trade Unions shall issue the Appellants with the Certificate of Registration of KUEPCAI, with effect from the date of this Judgment;***
- d. ***The Registrar shall enter the name and details of KUEPCAI in the appropriate register forthwith; and***
- e. ***No order on the costs.***

**Dated and delivered at Nairobi this 16<sup>th</sup> day of January 2014**

**James Rika**