



**REPUBLIC OF KENYA**

**IN INDUSTRIAL COURT OF KENYA**

**AT NAIROBI**

**PETITION NO. 1 OF 2013**

**BRIAN ACHIENG WERE ..... 1<sup>ST</sup> PETITIONER**

**JACINTA RWAMBA IRERI ..... 2<sup>ND</sup> PETITIONER**

**STELLA WANGARI WARUINGI ..... 3<sup>RD</sup> PETITIONER**

**(Suing on their own behalf, on behalf of all**

**Registered Clinical Officers, Associate Members**

**and on behalf of 231 others) ..... PETITIONERS**

**VERSUS**

**THE HON. ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**THE MINISTER OF LABOUR ..... 2<sup>ND</sup> RESPONDENT**

**THE MINISTER OF PUBLIC HEALTH**

**AND SANITATION ..... 3<sup>RD</sup> RESPONDENT**

**THE MINISTER OF MEDICAL SERVICES ..... 4<sup>TH</sup> RESPONDENT**

**THE REGISTRAR OF TRADE UNIONS ..... 5<sup>TH</sup> RESPONDENT**

**AND**

**UNION OF KENYA CIVIL SERVANTS ..... 1<sup>ST</sup> INTERESTED PARTY**

**KENYA UNION OF DOMESTIC, HOTELS,**

**EDUCATIONAL INSTITUTIONS AND**

**HOSPITAL WORKERS ..... 2<sup>ND</sup> INTERESTED PARTY**

Mr. Njiraini for the Petitioner

## JUDGMENT

1. The three (3) Petitioners are registered Clinical Officers qualified to practice as such under the Clinical Officer (*Training Registration and Licencing*) Act Cap 260 Laws of Kenya.

They have sued on their own behalf and on behalf of all their registered colleagues named as Petitioners 4 to 235.

2. They allege violation of fundamental rights and freedoms under *Articles 10, 27, 30, 36, 40, 41, 43, 47, 48 and 50* of the *Constitution of Kenya 2010*.

They also rely on the provisions of the *Labour Relations Act, 2007*.

### 3. **Facts on which the Petition is founded**

That though the Petitioners and especially those in the public health institutions are not members of the 1<sup>st</sup> Interested Party, the 3<sup>rd</sup> and 4<sup>th</sup> Respondents have continued to unlawfully deduct from their salaries union dues which is then illegally transmitted to the 1<sup>st</sup> Interested Party.

That those in private employment do not belong to any union that caters for their interest as professional clinical Officers.

4. That similarly, the 1<sup>st</sup> Interested Party is a jack of all trades and therefore does not adequately cater and/or protect the rights of the Petitioners.

That the 2<sup>nd</sup> Respondent has deprived the Petitioners the right to register their own union in violation of *Article 41* of the *Constitution of Kenya 2010* and *Section 4* of the *Labour Relations Act*.

5. That by a letter dated 28<sup>th</sup> June 2012, to the 5<sup>th</sup> Respondent, the Petitioners applied for registration of **Union of Kenya Clinical Officers (UKCO)** and were issued with a provisional registration on 18<sup>th</sup> July 2012.

That the Petitioners had legitimate expectation to the effect that once the requirements under the Labour Relations Act, No. 14 of 2007 have been met on provisional registration, their trade union would be registered.

6. On the strength of the aforesaid provisional registration, the Petitioners prepared their Trade Union's Constitution and lodged it for registration with all the necessary supporting documents dated 18<sup>th</sup> September, 2012 and was received by the 5<sup>th</sup> Respondent on 26<sup>th</sup> September 2012 and on payment of requisite fee.

7. The 5<sup>th</sup> Respondent published the Petitioners proposed name of the trade union.

The 5<sup>th</sup> Respondent then refused to register the proposed trade union.

The 5<sup>th</sup> Respondent relied on the objection by the 2<sup>nd</sup> Interested Party in its decision not to register the union. The 1<sup>st</sup> Interested Party did not note any objection to the proposed registration.

The Petitioners thus allege violation of their Constitutional Rights and Fundamental Freedoms as stated in the Petition.

8. The Petitioners seek the following prayers:

- a. a declaration that the Respondent have violated and/or are likely to violate the Constitutional Rights of the Petitioners, the people they represent and in particular Articles 10, 27, 30, 36, 40, 41, 43, 47, 48 and 50;
- b. a declaration that the notification of refusal of registration of the Petitioners trade union by the 5<sup>th</sup> Respondent on the objection of the 2<sup>nd</sup> Interested Party and in favour of the 1<sup>st</sup> Interested Party herein and other already registered trade unions as contained in FORM D is unconstitutional, null and void;
- c. an order compelling the 5<sup>th</sup> Respondent to immediately register the Petitioners' union of Kenya Clinical Officers (UKCO) as a trade union;
- d. an order prohibiting the Respondents and Interested parties whether by themselves, their agents and/or servants or any person authorized by them from restricting or otherwise limiting the Petitioners' right to form, join, participate, opt in and or opt out of the activities and programmes of any trade union *inter-alia*.

9. The Petition is opposed by the 1<sup>st</sup> and 2<sup>nd</sup> Interested parties, the 1<sup>st</sup> Interested party having filed a replying affidavit dated 7<sup>th</sup> June 2013 and filed on the same date, whereas the 2<sup>nd</sup> Interested Party filed a replying affidavit dated 29<sup>th</sup> July 2013.

From a reading of the said affidavits, the 2<sup>nd</sup> Interested Party objected to the Registration of the union by a letter dated 1<sup>st</sup> November 2012 to the 5<sup>th</sup> Respondent, The Registrar of trade unions whereas, the 1<sup>st</sup> Interested Party did not write any such objection.

10. Both Interested parties depose to facts which indicate that they are registered unions which cater for the Interested Parties. The 1<sup>st</sup> Interested party operates in the public sector whereas, the 2<sup>nd</sup> Interested Party operates in the private sector.

That their respective collective agreements cater for the interests of the petitioners and therefore there is no need to proliferate unions as this would erode gains made and cause confusion at the work place.

11. That the Freedom of Association under *Section 4* of the *Labour Relations Act, 2007* and *Article 41* of the Constitution is limited by *Article 24* of the Constitution.

That in any event, the procedure of challenging the decision of the 5<sup>th</sup> Respondent to refuse the Registration of the said union is by an Appeal process provided under *Section (30)* of the *Labour Relations Act, 2007*.

That the promulgation of the Constitution did not jettison the quick and non-complicated procedure provided under the said Act, and it is burdensome and an abuse of the process of the Court for the Petitioners to avoid this quick access to justice in favour of a complicated process of filing a petition at the High Court.

12. That this does not engender quick dispensation of justice and the Court should put its mark of disapproval for the failure to observe mandatory statutory provision by dismissing the Petition and direct the Petitioners to start the process afresh if they so wish and/or take advantage of the already existing unions to exercise their freedom of association.

13. None of the Respondents have filed a response to the Petition and as a matter of fact, have not shown any interest in the matter as they have not made any appearance at all.

Be that as it may, the pleadings and the submissions before Court suffice to canvass the issues that fall to be determined.

14. In particular the following issues have been delineated for determination:

- i. whether the failure by the Petitioner to challenge the decision of the Registrar of Trade Unions (5<sup>th</sup> Respondent) by way of an Appeal in terms of *Section 30* of the *Labour Relations Act, 2007* is fatal to these proceedings;
- ii. whether the alleged violation of the rights and freedoms of the Petitioners has been established;
- iii. what remedy if any, is available to the Petitioners.

### **Issue I**

15. Since the enactment of the Labour Relations Act, 2007, the Industrial Court has held the view that any challenge of a decision by the Registrar of Trade Unions to Register or to refuse to register a proposed union must be in terms of *Section 30* of the *Act*, which provides as follows:

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

*Section 4(1)* of the Act provides:

**“Every employee has the right to:**

- a. **Participate in forming a trade union or federation of trade unions;**
- b. **join a trade union; or**
- c. **leave a trade union.**

This right is restated in the Constitution of Kenya under *Article 41* as follows:

**“41(2) Every worker has the right .....**

- c. **to form, join or participate in the activities and programmes of a trade union.**

16. The provisions under *Section 30* of the *Labour Relations Act*, is meant to provide a quick relieve to a party who is aggrieved by a decision of the Registrar. This is a provision that is in favour of upholding the right of a party who seeks to exercise his right and freedom of association in terms of the Act, and now under the new Constitution.

The provision has put a time limit of 30 days within which the appeal against the decision of the Registrar is to be instituted. This limitation has been upheld in various decisions of this Court and has a rationale of resolving disputes regarding to registration of unions and other related matters expeditiously and in a non-complicated manner.

17. Seen in this light and with regard to the 2<sup>nd</sup> issue herein, a denial by the Registrar to register a proposed union perse, does not amount to a violation of any Constitutional right of the Petitioner herein or of any other person who seeks to register a union.

This is because the right to form or join a union of choice is circumscribed by various provisions of the Labour Relations Act, which provisions guide the Registrar of Trade Unions in arriving at a decision which is just and equitable in the circumstances of the case.

18. *Section 12* provides an elaborate procedure that an applicant must follow in applying for the registration of a union. This procedure was followed to the letter by the Petitioner herein.

The Petitioner further complied with the provisions of *Section 14(1)(a) – (c)* of the Act.

19. However, the Application was caught by the provisions under *Section 14(1) d(i) and (ii) and 14(1)(e) - (j)* which provisions purport to limit the powers of the Registrar to register a trade union in circumstances where there is in existence a rival union which is:

**“sufficiently representative of the whole or of a substantial proportion of the interests in respect of which the applicants seek registration;”**

The 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties are such rival unions. The 2<sup>nd</sup> Interested Party specifically objected to the registration of the purposed union in terms to the proviso to *Section 14(1) (d)(i) and (ii)*.

20. The Registrar in his considered view found that 1<sup>st</sup> and 2<sup>nd</sup> Interested parties who presently represent the interest of Clinical Officers in the public and private sectors respectively do represent their interests sufficiently and therefore there was no need of registering a further union.

The determination of this matter largely hinges on the interpretation of the provisions of the *Labour Relations Act*.

21. It is the Court’s considered view that since the Application to register the union was in the main based on the provisions of this Act, the Petitioners were bound to ventilate the matter in terms of the provisions of this Act and in particular ought to have lodged an appeal within 30 days from the date of the decision of the Registrar to refuse to register the proposed union.

This way, there will be certainty in the administration of justice concerning decisions of the Registrar of Trade Unions.

22. In arriving at this decision, the Court is alive to the provisions of Article 159(2)(d) which provides:

**“Justice shall be administered without undue regard to procedural technicalities”**

while seeking to promote and protect the principles and purpose of the Constitution.

The Constitution is enforced through statutory provisions, old and new that are not inconsistent with its provisions.

If the Courts were to disregard statutory provisions such as *Section 30* of the *Labour Relations Act*, it would be in the process be promoting uncertainty in the application of the law and at the same time acting contrary to statutory law to which the Court should equally have due regard and only disregard it if it is contrary to the express provisions of the Constitution.

23. The Court notes that, an appeal under *Section 30* of the *Labour Relations Act* permits effective remedy to a person aggrieved by a decision of the Registrar. In this case, upholding the registration of the new union would simultaneously sort out the issue of payment of Agency fees to the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties.

Furthermore, even upon registration, the recognition of the union and Collective Bargaining that would ensue are matters within the purview of the *Labour Relations Act*.

24. The Court is of the view that if the Petitioners still wish to pursue the registration of the proposed union, they still may do so afresh in terms of the provisions of the Act which in the Court's view provides a mandatory procedure to guide the enjoyment of the freedom of Association and the rights emanating therefrom guaranteed by the statute and the Constitution itself.

25. Accordingly, the Court finds that the Petitioner has not established violation of the rights and Freedoms enshrined in the Constitution as alleged to the extent that they did not exhaust the avenues provided in the enabling statute, being the *Labour Relations Act, 2007*.

I make this decision in full knowledge of my decision in **I.C. at Nairobi, Petition/Appeal No. 50 of 2012 Seth Payako and 6 others Vs. The Attorney General and others** in which during the hearing and by consent of the parties, the Court permitted the pleadings filed as a petition to be converted into an appeal in terms of *Section 30* of the *Labour Relations Act*. This happened within the 30 days period permitted under *Section 30* of the *Act*.

I therefore distinguish that matter from the present one which has proceeded as a petition and was heard well after the 30 days had lapsed and no such proposal was canvassed in any event.

Accordingly, the Petition is dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties.

**Dated and Delivered at Nairobi this 25th day of April, 2014.**

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**