



CLAIMANT: CENTRAL ORGANISATION OF TRADE UNIONS-[COTU]

RESPONDENT:THE REGISTERED TRUSTEES OF THE CONFEDERATION OF KENYA TRADE UNIONS.

RULING

1.Before me is a Preliminary Objection by the Respondent to the Statement of Claim filed in Court on 13/7/2011.

2.The Preliminary Objection is on the grounds that this Court lacks the *jurisdiction* to hear the Claim and that the Claim is *fatally defective, frivolous, vexatious and an abuse of the Courts process.*

Background.

3. On 13/7/2011, the Central Organisation of Trade Unions hereinafter 'COTU(K)' filed a statement of claim against the Respondent, the Registered Trustees of the Confederation of Kenya Trade Unions seeking orders;

- a. *A declaration that the Respondents not having been registered under the Labour Relations Act cannot and should not carry out Trade Union Activities.*
- b. *An injunction restraining the Respondents by themselves and/or their authorized agents from carrying themselves as Trade Unionists or directly or indirectly carrying out any Union activities.*
- c. *The Trustee be restrained for collecting funds or purport to represent workers in any forum as trade Unionist by collecting, receiving donations or levying employees.*
- d. *Costs of this suit.*

4.It is not clear from the record when the Respondents were served. Indeed the record does not indicate whether the Respondent has filed any Response to the Statement of Claim within 14 days as required by rule 13 of the Industrial Court (Procedure) Rules 2010.

5.Be that as it may, the parties appeared before Justice Chemmutut on 1/9/2011 wherein a hearing date was set for 12/10/2011.On the same date, the Respondent filed the Preliminary Objection which is the subject of this ruling. The Objection was thereafter fixed for arguments on 14/2/2012 but on that day hearing of the Objection was adjourned to 12/3/2012 and further adjourned to 13/3/2012 with the consent of the parties. On 13/3/2012 the objection was not heard and the claimant was granted leave to file a reply to the Objection. The Court fixed the objection for arguments on 5/4/2012.For reasons not given on the record the objection was not heard on 5/4/2012 but it was again pushed to 27/7/2012.

6.By 27/7/2012 due to the transition consequent upon the promulgation of the Constitution in 2010, the 'new' Industrial Court judges had been sworn and it is in these circumstances that this matter was placed

before me. Both parties indicated their readiness to proceed with the Preliminary Objection and the hearing of the Preliminary Objection proceeded. Mr. Laichena argued the Respondents objection while Ms. Guserwa represented COTU (K)s position.

Parties Submissions: Respondent/Objector

7. In submitting on the issue of jurisdiction, the first point taken by Mr. Laichena was that the Respondent was not a trade union within the meaning of the labour laws of Kenya to bring it within the ambit of the Industrial Court. Mr. Laichena buttressed the submission with the argument that the Respondent entity is a registered trust and therefore is established and registered under a different regime of law falling outside the mandate of the Industrial Court.

8. Mr. Laichena referred the Court to Section 2 of the Labour Relations Act where a 'trade union' is defined to mean '*an association of employees whose principal purpose is to regulate relations between employees and employers, including any employers' organisation.*' It was his contention that the Respondent had not applied for registration as a trade union.

9. Mr. Laichena also placed reliance upon section 12 of the Labour Institutions Act which provided for the jurisdiction of the Court. He stated that what COTU (K) is challenging is the establishment of the Respondent which cannot be equated with a trade dispute which is also defined in section 2 of the Labour Relations Act.

10. Regarding the objectives of the Respondent, Mr. Laichena submitted that these could only be questioned in the High Court. Closely tied with this, he continued was the right to *freedom of association* as enshrined in Article 36 of the Constitution. In registering as a trust, the Respondent was enjoying a constitutional right.

11. Interpretation and enforcement of the right of *freedom of association* was the preserve of the High Court, so the argument continued. The Claimant, the Respondent contended was challenging its enjoyment of its constitutionally guaranteed rights. The legality of existence and or registration of a body pursuant to the freedom of association and violation of fundamental rights could only be challenged before the High Court pursuant to Article 165(3) (b) of the Constitution.

12. The second point taken by the Objector was that the claim is vexatious, frivolous and an abuse of court process because the claims enumerated therein were based purely on self interests and not in the interest of labour relations or laws in the country. The claim, it was submitted was baseless and presumptive.

13. It was further contended that the prayer seeking to restrain the Respondent from collecting funds or donations from employees could not be granted.

Parties Submissions: Claimant/Respondent

14. In response, Ms. Guserwa argued that the Preliminary Objection was not a proper preliminary objection because it was based on both points of law and fact. It was her contention that an objection based on facts should be supported by an affidavit.

15. She further faulted the Preliminary objection for not having cited any provision of law although she conceded that Section 12 of the Labour Institutions Act, which had been referred to by the Respondent in submissions could be applicable.

16. Ms. Guserwa pointed out, and rightly so, that Section 12 of the Labour Institutions Act, had been repealed and replicated in Section 12 of the Industrial Court Act. She also pointed out that at the time of filing the claim, the applicable provision on jurisdiction was Section 12 of the Labour Institutions Act.

17. In her view, section 12 of the Labour Institutions Act, then, and as replicated in Section 12 of the Industrial Court Act gave the Court immense and exclusive powers.

18.Ms. Guserwa in further submission on the jurisdiction question referred the Court to the description of the Respondent as '*the Registered Trustees of the Confederation of Kenya Trade Unions*'.

19.She also took issue with the Respondent for not disclosing its proper legal status and submitted that the name and objectives of the Respondent as indicated in the Trust Deed marked '*App COTU (K) 1*' clearly showed the Respondent is a trade union camouflaged as a trusteeship.

20.Particular emphasis was put on objectives 2(a);(b) (c) (d) up to (l) which she submitted were the preserve of a trade union and that these were in violation of Section 12 of the Labour Relations Act which provide for the establishment of trade unions. It was her contention that any person intending to carry out trade union activities must comply with the applicable provisions of the Labour Relations Act.

21.In Ms. Guserwa's argument, the mischief was in the Respondent's objectives and not only the name of the Respondent and that freedom of association could only be exercised within the constraints of the legal framework and further that the Respondent would not suffer any prejudice if the orders sought were granted, if it was not a trade union.

22.In reference to the interpretation of Section 12 of the Industrial Court Act, Ms. Guserwa submitted that section granted this Court the jurisdiction to deal with constitutional matters involving workers and employers and their organisations.

23.In conclusion, Ms. Guserwa argued that the Respondent had held itself out as dealing with labour issues in their press advert of 14/1/2011 in the Daily Nation.

Issues for determination.

24.The issues for the determination of this Court are:

A. *whether the Respondent is a trade union within the labour laws legal framework of Kenya*

B. *If the answer to question A above is in the negative whether this Court has jurisdiction to arbitrate on a dispute between a duly registered trade union and a body registered under a different regime of law but whose objectives appear to suggest it is a trade union.*

C. *Whether the industrial Court has the jurisdiction in terms of Article 165 (3) (b) of the Constitution as read with Articles 162(2) and 165(5) (b).*

Analysis

25.It is not in doubt and indeed it is public knowledge that COTU (K) is a registered federation of trade unions as averred in the statement of claim. The registration of COTU (K), I assume, was effected in accordance with the applicable legal regime at the material time which was the Trade Disputes Act. The Constitution and Rules of COTU (K) were exhibited as Claimants '*App COTU (K) 2*'. There is no dispute as to COTU (K)s objectives.

26.The Trust Deed, which sets out the objectives of the Respondent were also exhibited as Claimants '*App COTU(K) 1*'. The objectives of the Respondent and more particularly as indicated in paragraph 2 of the Trust Deed are also not in dispute. Therefore, I will not endeavour to repeat them here *in extenso* save to acknowledge that on the preamble of the Trust Deed it is stated:

'Setting up the charitable trust The Confederation of Kenya Trade Unions to promote and organize workers, Trade Unions and Workers Organizations individually and collectively in various job categories in Kenya and assist them in advancement of their Socio Economic growth'

and at Clause 2(b)(i) which provide:

Regulating relations, negotiating and settling disputes between members of COKETU and employers.

27. I don't think that I need say any more except to repeat the definition of a trade union at Section 2 of the Labour Relations Act, which defines a trade union as:

an association of employees whose principal purpose is to ***regulate relations between employees and employers***, including any employers' organisation.

28. The Trust Deed setting up the Respondent was presented before the Lands Department on 7/10/2010.

Whether the Respondent is a trade union

29. Arising from what is stated herein in paragraphs 26 and 27, the question is whether the Respondent can be classified as a trade union within the framework of the labour laws of Kenya?

30. A simple glimpse of Section 2 of the Labour Relations Act indicates that 2 different types of entities are contemplated. These are '*registered trade union*' which is defined as a trade union registered or deemed to be registered as a trade union under the Act and a '*trade union*' which is defined as an association of employees whose principal purpose is to regulate relations between employees and employers including any employers' organisation. I am also mindful of the fact that the Industrial Court Act, 2011 has in its interpretation part at Section 2 defined a '*trade union*' to mean a registered association of employees whose principal purpose is to regulate relations between employees and employers and includes an employers' organisation.

31. There can be possibly be no other conclusion except that the Respondent herein, considering its objectives though not a registered trade union, is a trade union none the less for the purposes of the Labour Relations Act. I therefore answer question (A) raised above herein in the affirmative.

Whether Industrial Court has jurisdiction

32. I consequently proceed to examine the issue raised in (B) on whether this Court has jurisdiction to arbitrate on a dispute between a duly registered trade union and a body registered under a different regime of law but whose objectives appear to suggest it is a trade union.

33. The statutory underpinning for the jurisdiction of the Industrial Court is found in Section 12 of the Industrial Court Act, 2011. For the purposes of the instant determination, to my mind the relevant provision is Section 12(2) which is to the effect that *an application, claim or complaint may be lodged with the Industrial Court against a trade union*. Section 12(2) however should not be interpreted in isolation from section 12(1) which gives the Industrial Court exclusive original and appellate jurisdiction to determine all disputes referred to it in accordance with Article 162(2) of the Constitution and other laws including '*disputes between an employers' organisation and a trade unions.*'

34. I therefore do hold that the Industrial Court has the jurisdiction to determine the Claim filed by COTU (K) against the Respondent. Considering my answer to the first 2 issues I do not think it is appropriate to attempt to answer issue (C) on the Constitutional jurisdiction of the Industrial Court at this stage. I do not think it is appropriate to attempt to answer issue (C) on the Constitutional jurisdiction of the Industrial Court at this stage. I am also aware of 2 recent conflicting decisions of the High Court given in Nairobi High Court Petition No. 170 of 2012 *United States International University (USIU) v The Attorney General & others* (2012) eKLR and Nairobi High Court Petition No. 341 of 2011, *Samuel G. Momanyi v the Attorney General & Another* [2012] eKLR on the jurisdiction of the Industrial Court regarding enforcement and interpretation of the Bill of Rights as implicated in employment and industrial relation matters.

35. I am fortified in not making a decision thereon with the realisation that the determination of that question is central to the resolution of the core issues raised in the Statement of Claim herein and raises a *substantial question of law* as envisaged under Section 21 of the Industrial Court Act, 2011 and I do not

want to pre-empt such resolution.

36.The end result is that the Preliminary Objection is dismissed.

Orders

37.The Court therefore orders as follows:

(a) The Respondent is ordered to file its Response on or before 5 October 2012.

(b) The Registrar of this Court do place this file after lapse of TEN (10) days before the Chief Justice for purposes of assigning an uneven number of Judges of this Court to hear the Cause.

(c) This Cause be mentioned before the Judges assigned by the Chief Justice on 31 October 2012 for further directions.

(d) No order as to Costs.

Dated and delivered in open Court at Nairobi this 5th day of October 2012

Justice Radido Stephen

Judge

Appearances

Ms. Judith Guserwa instructed by
M/s J.A. Guserwa & Co. Advocates

For Claimant/Respondent

Mr. Laichena instructed by
Laichena Mugambi & Co. Advocates

For Respondent/Objector