



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1 of 2011

Kenya Union of Employees of Polytechnics

Colleges & Allied Institutions

Appellant

v

The Registrar of Trade Unions

Respondent

Kenya Union of Domestic, Hotels, Education Institutions,

Hospitals & Allied Workers

Interested Party

RULING

1. On 10 January 2011, the Kenya Union of Employees of Polytechnics, Colleges & Allied Institutions (the Appellant) filed a Memorandum of Appeal against the decision of the Registrar of Trade Unions (the Respondent) refusing its application for registration.
2. On 25 March 2011 the appeal was placed before Justice Chemmutut (he has since ceased holding office of judge of the Industrial Court) wherein he directed the Respondent to file its Replying Statement on or before 28 April 2011. He set the hearing of the appeal for 1 September 2011.
3. On 1 September 2011, the appellant appeared and the record indicates that Mr. Charles Kariuki appeared for the Kenya Union of Domestic, Hotels, Education Institutions, Hospitals & Allied Workers (the Interested Party). Justice Chemmutut then directed the Interested Party to file its papers on or before 16 September 2011. The Interested Party however filed its papers on 14 September 2011. The record does not indicate whether the Interested Party sought and got leave to file its Response to the Appeal out of time. The Judge set the appeal for hearing on 13 October 2011. On this day, the hearing of the appeal did not proceed but instead the Respondent was directed to file its Response on or before 27 October 2011 and hearing adjourned to 10 May 2012.
4. On 10 May 2012 the hearing again did not commence and it was pushed to 16 July 2012 when again for reasons not on record the hearing did not start.
5. On 25 September 2012, the Appeal was placed before me and because all the parties were present and indicated they were ready to proceed, I allowed hearing of the appeal to commence. Mr. Enoda appeared on this occasion for the Appellant, Mr. Langat the Registrar of Trade Unions was present and Mr. Oundo appeared for the Interested Party. The hearing was not concluded on that day and I adjourned

it to 23 October 2012 when it was concluded. I reserved judgment for 14 December 2012.

6. During the hearing, Mr. Enoda did inform the Court that he had filed a Notice of Motion dated 23 May 2011 on 10 July 2011 seeking leave to amend the Memorandum of Appeal by substituting the Appellant with names of its promoters.

7. I have keenly perused the record of the proceedings in the file and there is no record whatsoever on the file that this application by Mr. Enoda on behalf of the Appellant had been served or argued and determined.

8. The Notice of Motion sought to introduce the promoters of the Appellant, Japheth Anyira Agura, Mathew Cheruiyot, Mary Toto Emojong, Timothy Osiru Okata, Violet Kadogo Mukangai, Jane Wairimu Kabuthia and Eston Kidiga Andambi as the Appellants. It was stated on the body of the Motion that the Appellant was yet to acquire legal capacity to bring the proceedings in its own name.

9. In my view, considering the foregoing, the options open to me are limited. None of the parties addressed me on the question of the legal capacity of the Appellant to bring and prosecute the Appeal or deal with the initial Appeal as unamended. The parties only addressed me on the merits of the appeal.

10. The Industrial Court is now a superior Court of record. And it must keep a proper and correct record of proceedings before it. Proceeding to prepare and deliver a judgment as I had ordered may result in an apparent error on the face of the record.

11. Article 159(2) (d) of the Constitution and section 20 of the Industrial Court Act command this Court to administer justice and act without undue regard to (procedural) technicalities.

12. The question which I must grapple with therefore is whether the legal capacity of a party is merely a procedural technicality or it is a substantive issue which goes to jurisdiction and competence of a Cause. In my view it is a substantive issue which must be addressed as it could dispose of the appeal *in limine*.

13. A trade union acquires legal or juristic personality upon registration. It is only upon registration that it becomes a corporate body capable of suing and being sued as provided for in section 21 of the Labour Relations Act. Before registration, a proposed trade union has no legal rights or interests of its own. Any rights or interests it may have are inchoate rights or interests. The rights and interests can lawfully only be claimed or litigated upon by the proposed promoters.

14. At the time the Registrar of Trade Unions refused registration to the Appellant, it is the promoters who were aggrieved and they are the persons contemplated by section 30 of the Labour Relations Act to appeal to the Industrial Court.

15. It must have been that realization upon which nudged the Appellant to seek to amend the Memorandum of Appeal. That application has not been determined by the Court nor is there any indication that the Respondent and the Interested Party consented to it being granted.

16. It would not be proper or legitimate for this Court to proceed to prepare and deliver a judgment before the application is disposed off.

17. This Court as a superior Court of Court has the inherent power to regulate and ensure that its processes and proceedings are valid. In this regard I do direct that the Notice of Motion application seeking to amend the Memorandum of Appeal be disposed off first before the Appeal is determined on merits.

18. In the circumstances I do vacate the proceedings taken before me on 25 September 2012 and 23 October 2012 and direct that the Notice of Motion seeking to amend the Memorandum of appeal be determined first before any other Judge in Nairobi.

Dated and signed in Mombasa on this 14th day of December 2012.

Justice Radido

Judge of the Industrial Court.

Delivered and signed in open Court in Nairobi on this 14th day of December 2012.

Justice Nzioki wa Makau

Judge of the Industrial Court

Appearances

Mr. Enoda instructed by '*Kenya Union of Employees of*

Polytechnics, Colleges & Allied Institutions'

For Claimant Union

Mr. Langat, Registrar of Trade unions

For Respondent

Mr. Njiru instructed by Kenya Union of Domestic, Hotels, Education

Institutions, Hospitals & Allied Workers

For Interested Party