



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

APPEAL NO.2 OF 2011

IN THE MATTER OF APPEAL OF:

1. MUNIR MASOUD

2. PAUL K. MWANGI

3. IROSE MUSUNGU

4. GEORGE OPANGA

5. SAID RUWA

6. DAVID CHEROP

7. YUVENALIS GESORA PROPOSERS AND PROMOTERS

OF TAX COLLECTORS UNION.....APPELLANTS

VERSUS

THE REGISTRAR OF TRADE UNIONS.....1ST RESPONDENT

BANKING, INSURANCE & FINANCE UNION.....INTERESTED PARTY

(Before Hon. Lady Justice Maureen Onyango on 5th December, 2012)

JUDGMENT

By a Memorandum of Appeal dated 6th January 2011 and supported by a verifying affidavit of MUNIR ABUBAKAR MASOUD sworn on the same date, the proposed Tax Collectors Union. The Claimant was later substituted through an amendment with the Appellants namely MUNIR MASOUD, PAULK. MWANGI, ROSE MUSUNGU, GEORGE OPANGA, SAID RUWA, DAVID CHEROP and YUVENALIS GESORA who describe themselves as PROPOSERS and PROMOTERS OF TAX COLLECTORS UNION, the appellants seek the following orders:

- a) That the decision by the Respondent refusing to register the appellant dated 10th December 2010 be quashed.
- b) That an order do issue against the Respondent, to register the Tax Collectors Union.

- c) Any other further or better relief that this Honourable Court may consider appropriate.
- d) That the Respondent do bear costs of this Appeal.

In the memorandum of Appeal the Appellants have stated that they rely on the following legal provisions-

- a) Industrial Relations Charter Part B II clause No.4
- b) Section 4, 5 and 30 of the Labour Relations Act, 2007.
- c) Section 6, 7, 12 and 31 of the Labour Institutions Act 2007.
- d) The Constitution of Kenya Article 27(1): (2): (4) and (6), Article 41(1) and (2) (c) and Article 73.

The Appellants have in the memorandum of Appeal given a history of registration of the proposed Tax Collectors Union which first sought registration on 21st January 2002 seeking to represent employees of the Kenya Revenue Authority only.

The application for registration of the proposed union was rejected by a letter from the Registrar of Trade Unions, the Respondent herein, after objections were raised by Kenya Union of Commercial, Food and Allied Workers (KUCFAW), Banking Insurance and Finance Union (BIFU(K), Central Organization of Trade Unions Kenya(COTU), Federation of Kenya Employers and the Labour Commissioner on the ground that employees of Kenya Revenue Authority are adequately covered by BIFU(K) KUCFAW and the Union of Kenya Civil Servants (UKCS).

On 10th August 2009 the proposed union filed the second application for registration. The Interested Party was enjoined pursuant to an application dated 23rd February 2011 and filed in Court on 24th February 2011.

The Respondent filed its Memorandum of Response to the Appeal on 4th August 2011 and an amended memorandum of Response on 24th May, 2011. In both documents the Respondent states that it is responsible for registration and regulation of all trade unions, federations of trade Unions and employers organizations. That whilst discharging its duties, it is required to act on the advise of the National Labour Board, that the applicants did not challenge the first refusal to register the proposed union, that the second application for registration was filed on 10th August 2009. The Respondent submits that the Appellants interests are well catered for by existing unions namely Kenya Union of Commercial Food and Allied Workers and Banking, Insurance and Finance Union, that the law is very clear that no other union can be registered where there is already another registered union which is sufficiently representative of the interests for which the applicant seeks registration and that the decision to refuse registration of the proposed Tax Collectors Union is within the powers conferred on the Respondent by the Labour Relations Act.

The Interested Party, Banking Insurance and Finance Union filed its Memorandum of Interest on 11th March 2011 and the Amended Memorandum of Interest on 10th May 2012.

In the Memorandum of Interest the Interested Party states as follows:

- a) It was registered as a trade union on 7th May 1986,
- b) Its constitution covers the interests of employees of Kenya Revenue Authority,
- c) It has recruited more than 900 employees of Kenya Revenue Authority into its membership comprising more than 51% majority,
- d) The Appellant did not appeal against the refusal to register the proposed union of 11th March

2004,

e) The interim secretary general of the proposed union joined the employment of the Interested Party on 18th September, 2003 to assist it in recruitment of employees of Kenya Revenue Authority and at one time contested for a position in the union's election but lost.

f) That having failed to challenge the first refusal of registration the Appellants are estopped from submitting a similar application

g) the Appellants failed to apply for a certificate to promote their proposed union against mandatory procedure under the Labour Relations Act

h) the application for registration of the proposed union is incurably defective. It does not meet the mandatory requirement for 7 members of a proposed union to sign Form "A" as it was signed by only 6 eligible members since Mr. Masoud is not an employee of the Kenya Revenue Authority and therefore not eligible to be a member of the proposed union and to sign Form A,

i) The application by the proposed union to represent employees of only one employer is contrary to section 14 of the Labour Relations Act which only authorizes sector based unions, and the Government Policy on trade unions which promotes viable, independent, democratic and strong unions, and

j) that Mr. Munir A. Masoud is not eligible to be an official of the proposed union by virtue of section 31(2) of the Labour Relations Act which provides that no person shall be an official of more than one organization as he is an official of Hazina Employees Welfare Association and has also vied for election as an official of the Interested Party where his appeal against the elections is still pending before this Court as Misc. Application No. 5 (A) of 2009.

The Appeal was mentioned in Court on 21st July 2011 and 20th January 2012. The hearing of the Appeal started before Hon. Justice Mukunya on 25th May 2012 and was adjourned to 22 June 2012 for the Respondent and Interested Party's submissions. On 23rd June 2012 the case was rescheduled for hearing on 31st July, 2012 when the Appellants submissions were heard. When the case came up for hearing on 31st July 2012, the case was allocated to me as Justice Mukunya had by then retired. The parties agreed to continue with the hearing of the Appeal from where it had reached before Justice Mukunya. I therefore heard submissions by the Respondents and the Interested Party on 31st July, 2012. The parties thereafter agreed to file written submissions and came back for mention on 27th September, 2012. The parties highlighted their written submissions on 5th October 2012.

Registration of trade unions is provided for under Article 41(2) of the Constitution which gives every worker the right to form, join or participate in the activities and programs of a trade union, and in section 14 of the Labour Relations Act which is reproduced below:

(1) A trade union may apply for registration if:-

a) The trade union has applied for registration in accordance with this Act:

b) The trade union has adopted a constitution that complies with the requirements of this Act, including the requirements set out in the First Schedule;

c) The Trade union has an office and postal address within Kenya;

d) No other trade union already registered is-

(i) In the case of a trade union of employers or of employees, sufficiently representative of the whole or of a substantial proportion of the interests in respect of which the applicants seek registration; or

(ii) In case of an association of trade unions, sufficiently representative of the whole or a substantial proportion of the trade unions eligible for membership thereof:

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 unions 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) subject to subsection (2) only members in a sector specified in the constitution qualify for membership of the trade union;

f) the name of the trade union is not the same as that of an existing trade union, or sufficiently similar so as to mislead or cause confusion;

g) the decision to register the trade union was made at a meeting attended by the least fifty members of the trade union;

h) the trade is independent from the control, either direct or indirect, of any employer or employer's organizations and;

i) the trade union's sole purpose is to pursue the activities of a trade union.

(2) Notwithstanding the provisions of subsection (1) (d) the Registrar may register a trade union consisting of persons working more than one sector, if the Registrar is satisfied that the constitution contains suitable provisions to protect and promote the respective sectoral interests of the employees.

I understand the prayers by the Appellants to mean that I should find that their application for registration meets the requirements for registration of trade unions under the law and therefore the Registrar had no reason to refuse to register the Tax Collectors Union. Once I find this to be the position, I should set aside the decision of the Registrar refusing to register the union and finally, direct the Registrar to register the proposed Tax Collectors Union.

The issues as framed by the applicant are the following:

(i) Whether the appellant's application was lodged procedurally and whether the same was technically and legally sound.

(ii) Whether the appellants were given a fair hearing before their application for registration was rejected.

(iii) Whether the Respondent was justified in law and in fact to refuse the registration of the appellants union.

(iv) Who should meet the costs of this suit?

I agree with the issues as framed by the Appellants and adopt the same. I will proceed to consider the issues in the order in which they are presented.

1. Whether the Appellants application was lodged procedurally and whether the same was technically and legally sound.

"Section 14 of the Labour Relations Act sets out the requirements for registration of a trade union".

The first condition is that the trade union has applied for registration in accordance with the Act. Sections 18 of the Labour Relations Act sets on the manner in which an application for registration shall be made. The section provides that the application 'shall' be made to the Registrar in Form A and be accompanied by:

- a) The prescribed fee,
- b) A certified copy of the constitution of the trade union.
- c) A certified copy of the attendance register and minutes of the meeting at which the trade union was established.
- d) The application must be signed by 7 members of the trade union.

The Appellants have submitted that they complied with all requirements for registration of the union but the Respondent refused to register them because there are another 2 unions namely, the Kenya Union of Commercial Food and Allied Workers, and the Banking, Insurance and Finance Union which are sufficiently representative of the whole or substantial proportion of the interest in respect of which the proposed Tax Collectors Union seeks representation.

The Respondent and the Interested Party have both submitted that the Appellants application for registration of the proposed Tax Collectors Union does not meet the requirements of the Act. The Respondent has stated that there are three unions, KUCFAW, BIFU and The Union of Kenya Civil Servants which adequately represent the interests of workers of Kenya Revenue Authority, that the Appellants have admitted that at one time or another the employees of KRA have been recruited as members of the three unions with the active participation of the Mr. Munir Masoud, the Interim Secretary General of the proposed Tax Collectors Union. The Respondent has further submitted that the Appellants are not employees of Kenya Revenue Authority and therefore lack capacity to apply for registration of the proposed union as both the Kenya Constitution and the Labour, Relations Act reserve the right to form and participate in the activities and programs of a union to employees only and further, that the employees of Kenya Revenue Authority who were recruited as members of BIFU have never revoked their membership and have never been recruited as members of the proposed Tax Payers Union.

The Interested Party has associated itself with the submissions of the Respondent and in addition submitted that this being a second Application for registration by the same union and having failed to appeal against the refusal to register the union in the first instance, the Appellants are estopped from making another application for registration of the same union.

I have gone through the pleadings and note that the only documents relating to the application for registration that have been annexed to the Memorandum of Appeal or submitted to the Court is the application for registration dated 10th August 2009 and the receipt for payment for the application issued on the same date. Refer to Appellants Appendix xxv and xxvi. The application for registration does not contain the names, titles, identity certificate numbers, addresses and occupations of the applicants as required by Form A. It only contains 7 signatures without any identification of the signatories.

The Appellants have also not submitted a copy of the constitution of the proposed union or list of members with the appeal. I have not even seen the notification of refusal to register the union issued by the Respondent as none has been availed to the Court. If I have to quash the decision of the Respondent refusing to register the union, that decision must be before the Court. Further, if I have to direct the Respondent to register the Tax Collectors Union, a copy of the application form together with all the annexure required to be submitted together with the application must be availed to the court so that I can ascertain that the application was technically and legally sound as submitted by the Applicants. Sadly, I am unable to as that information has not been availed to me. The provisions of section 14 and 18 of the Labour Relations Act relating to the requirements for registration are couched in mandatory terms.

The Appellants have not proved that they complied with all the requirements prescribed by law and therefore that their application was technically and legally sound.

The other point arising from this issue is whether the Appellants' right to form, join or participate in the activities and program of a trade union as envisaged in Article 41(2) (c) of the Constitution were breached by the Respondent. On the outset I must point out that the Application for registration was lodged on 10th August 2009. The decision of the Registrar which as I have already stated has not been availed to the Court, must have been made before 11th August 2010, the date on which Munir Masoud issued a notice of intention to institute proceedings against the refusal to register the union to the Attorney General. By that date the Kenya Constitution had not been promulgated. It therefore follows that Article 41 could not have been breached by the Respondent before its enactment. Be that as it may, the issue is whether the Appellants were given a fair hearing before their application for registration was rejected which is the next issue for determination.

2. Whether the appellants were given a fair hearing before their application for registration was rejected

The Appellants have submitted that they were never given a hearing before their application was rejected by the Respondent. They were only asked to comment on the letters of objection. They also submit that they were never accorded a hearing after receiving comments from the National Labour Board. For these reasons the Appellants submit that their constitutional right to fair administrative action was denied. The Appellants also question the reliance by the Respondent on the National Labour Board to reach a decision. Further they submit that a representative of the Interested Party sits on the National Labour Board and there is no evidence that he recused himself when the Application of the Appellants was being discussed.

I have read the provisions of the Labour Relations Act that relate to registration of unions. There is no express provision for a hearing by the Registrar before he rejects an application for registration of a trade union. Section 20 only requires the Registrar, if not satisfied that the trade union meets the requirements for registration as set out in the Act and refuses the application, to advise the trade union in form D in the Second Schedule of the Act.

The Appellants did not ask to be heard. The Registrar had no obligation to go beyond his responsibility as set out in the Act to hear them. Nevertheless he sent all the objections to the registrations to the Appellants and asked for their comments. They were thus given an opportunity to respond to the objections raised against their application before the Registrar made the decision to reject their application for registration. In my opinion, this was a reasonable opportunity for the Appellants to raise any issues they had before the decision was made. I therefore find that they were not denied an opportunity to be heard.

On the issue of the Respondent relying on the advice of the National Labour Board, I do not see how he could fail to do so. The very law that permits him to make decision requires him to do so only after consulting the National Labour Board. Failing to do so would be in contravention of the law. It has not been alleged that the provisions of the law is unconstitutional. Unless the law is changed or declared unconstitutional, the Respondent is bound to comply with it. For these reasons I find no merit in the argument.

3. Whether the Respondent was justified in law and in fact to refuse the registration of the Appellants union.

The Court has already found as stated above that the documents availed to the Court are not sufficient to enable the court determine whether or not the application for registration by the Appellants met the requirements for registration as provided for in section 14 and 18 of the Labour Relations Act.

In their submissions the Appellants have relied on several provisions of the Kenya Constitution. I have already stated herein above that the application for registration was dealt with before the promulgation of

the constitution. The Respondent can therefore not be held responsible for implementation of the Constitution retrospectively.

The Appellants have submitted substantially that BIFU (K) does not meet the requirements of the Labour Relations Act. In my opinion this is a moot issue as the issue before the Court is not whether or not BIFU (K) is operating within the law. I have also been referred to the following cases and authorities by the Appellants counsel.

- (i) Mombasa High Court Civil Case No. 387 of 2002, Salim Idd Mwasina & 2 others Vs Registrar Of Trade Unions & 4 Others, Onyango Otieno .
- (ii) Industrial Cause No. 75 of 1999.
- (iii) Industrial Cause No. 28 of 1996.
- (iv) Court of Appeal in Appeal No.60 of 1988.
- (v) Industrial Court in Cause No. 488(n) of 2009, Kenya Long Distance Truck Drivers and Allied Workers Vs Kenya Road Transporters Association & Transport and Allied Workers Union.
- (vi) H.C. Misc. Appl. No. 1683 of 2004.

I find that all these cases are not relevant to the determination of this case as the issues determined in the cases were different from those in the present case.

On the issue that the Interested Party's representative sits on the Board and did not recuse himself, the Appellants have merely alleged that it is a possibility. They have stated that there is no evidence that he did not recuse himself. It was not for the Interested Party or the Respondent to submit the evidence, but the onus of the Appellants to do so. Having failed to submit the evidence they cannot accuse another party of not having done so. This therefore remains an allegation without proof. The Court has no information upon which to make a decision on the issue. The allegation is therefore not proved and is rejected for that reason.

The Interested Party submitted that the Appellants are not entitled to make another application for registration having failed to challenge the decision of the Respondent refusing to register the same union dated 18th January 2002. This argument has no merit as the present application is different from the earlier application. Each application is considered on its own merits.

In the end, I find that the Appellants have not convinced me that they are entitled to the orders prayed for in the appeal. Accordingly the Appeal is dismissed. Each party shall bear its costs.

DATED AND DELIVERED IN NARIOBI THIS 5TH DAY OF DECEMBER, 2012.

Hon. Lady Justice Maureen Onyango

JUDGE

Read and signed in the presence of:

Enonda instructed by Enonda, Makoloo, Makori and Company

Advocates for Claimant

W.K. Langat for Respondent

Isaiah Kubai for Interested Party