



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION 14 OF 2012

**IN THE MATTER OF ARTICLES 22 AND 23 OF THE CONSTITUTION OF THE REPUBLIC
OF KENYA
AND**

**AND IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS
AND FREEDOMS UNDER ARTICLES 3, 10, 36, 41 OF THE CONSTITUTION OF THE
REPUBLIC OF KENYA AND SECTIONS 7 OF THE SIXTH SCHEDULE OF THE
CONSTITUTION OF THE REPUBLIC OF KENYA**

AND

**IN THE MATTER OF SECTION 12, 13, 14, 18, 19, 20 AND 23 OF THE LABOUR RELATIONS
ACT, 2007 LAWS OF KENYA**

AND

IN THE MATTER OF SECTIONS 5, 6, 7 AND 31 OF THE LABOUR RELATIONS ACT, 2007

AND

**IN THE MATTER OF THE REGISTRATION OF KENYA EXPORT FLORICULTURE,
HORTICULTURE AND ALLIED WORKERS UNION (KEFHAWU) UNDER THE LABOUR
RELATIONS ACT 2007, LAWS OF KENYA**

AND

**IN THE MATTER OF THE CONSTITUTIONALITY OF SECTION 14(d) OF THE LABOUR
RELATIONS ACT, 2007, LAWS OF KENYA**

BETWEEN

DAVID BENEDICT OMULAMA..... 1ST PETITIONER

PETER WANJALA PALANG'A..... 2ND PETITIONER

BENARD AMUCHIZI MUKAISU..... 3RD PETITIONER

EFELI A. NANDI..... 5TH PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL.....RESPONDENT

RULING

The petition before me brought on behalf of over 400 workers in the floriculture horticulture industry seeks the following declarations:

- a) that the office of the Registrar of Trade Unions is bound by the Constitution and is under a duty to respect, uphold and defend the Constitution in terms of **Articles 2(1), 3(1), 24, 36 and 41** of the **Constitution**;
- b) that Section 14(d) of the **Labour Relations Act** is contrary to **Articles 24, 36 and 41** of the **Constitution** and to that extent is null and void;
- c) that the Registrar is in violation of the Constitution by inordinately delaying the registration of Kenya Export Floriculture Horticulture and Allied Workers Union contrary to **Article 36(3)** of the **Constitution**;
- d) that any attempt by the Registrar to inform the petitioners that their union cannot be registered as there is already another union in place violates **Articles 36(2)** of the **Constitution** and;
- e) that it is the petitioners' right to form or belong to Kenya Export Floriculture, Horticulture and Allied Workers Union.

Pursuant to the provisions of **Article 165(4)** of the Constitution, the court directed counsel for the parties to canvas the question whether the petition raises a substantial question of law.

Although the Attorney General, for the respondent was served and in fact entered appearance, he did not attend court on the scheduled date.

I have considered the submissions by learned counsel for the petitioner and hold the following view of the matter.

Section 80 (1) (2) (d) of the former **Constitution** provided that:

“80 (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say his right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his interests.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision –

.....

(d) for the registration of trade unions and

associations of trade unions in a register established by or under any law and for imposing reasonable conditions relating to the requirements for entry on such a register (including conditions as to the minimum number of persons necessary to constitute a trade union qualified for registration, or of members necessary to constitute an association of trade unions qualified for registration and conditions whereby registration may be refused on the grounds that another trade union already registered or association of trade unions already registered, as the case may be, is

sufficiently representative of the whole or of a substantial proportion of the interests in respect of which registration of a trade union or association of trade unions is sought)”

(Emphasis supplied).

Pursuant to the above provision the proviso to **Section 14** of the **Labour Relations Act** of 2007 stipulates that an existing registered trade union employers’ organization can object to the application for registration of a trade union on the ground that the latter represents the same interests as those already catered for by the registered union. On the other hand, **Article 36** of the **Constitution** provides that:

“36 (1) Every person has a right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.

(2) A person shall not be compelled to join an association of any kind.

(3) Any legislation that requires registration of an association of any kind shall provide that:-

a) registration may not be withheld or withdrawn unreasonably, and

b) there shall be a right to have a fair hearing before registration is cancelled.”

Article 41(2) (c) further confirms that every person has the right to form, join or participate in the activities and programmes of a trade union.

The petitioners applied to the Registrar of Trade Unions in July, 2009. The Registrar in exercise of powers derived from **Section 12** of the **Labour Relations Act**, promptly responded on 21st August, 2009 by issuing a certificate which allowed the petitioners to:

“ a)undertake lawful activities in order to establish a trade union and;

b) that an application for the registration of the trade union shall be made to the Registrar within six months.....”

According to the applicant, in compliance with that certificate, they have recruited over 400 workers to the trade union. As the application was pending before the National Labour Board for consideration, the General Secretary of Kenya Plantation and Agricultural Workers’ Union objected to the application, I suppose, pursuant to **Section 14** aforesaid on the ground that the interest of the petitioners and their members are already catered for by the Kenya Plantation and Agricultural Workers’ Union and therefore the registration of the Kenya Export Floriculture Horticulture and Allied Workers’ Union will cause confusion and create disharmony in the industry.

In view of these matters, it is my considered opinion that the court in determining the merits of the petition will consider;

i) whether **Section 14** of the **Labour Relations Act** violates **Articles 36** and **41** of the **Constitution**;

ii) whether in failing to determine the petitioners’ application after the objection of the General Secretary, Kenya Plantation and Agricultural Workers’ Union, the Registrar is in violation of **Article 36 (3) (a)** aforesaid and;

iii) whether the membership of the General Secretary of the Kenya Plantation and Agricultural Workers’ Union in the National Labour Board is contrary to the petitioner’s rights to a fair hearing in terms of **Article 36**.

Consequently, I come to the conclusion that the petition raises a substantial question of law which ought

to be determined by a bench of uneven number of judges.

Accordingly, this matter is hereby forwarded to the Hon. the Chief Justice to constitute a bench from the following judges serving in this court:

- i) Hon. Lady Justice R.P.V. Wendoh.
- ii) Hon. Mr. Justice M. A. Emukule.
- iii) Hon Mr. Justice W. Ouko and
- iv) Hon. Lady Justice H. O. Omondi.

Orders accordingly.

Dated, Signed and Delivered at Nakuru this 27th day of July, 2012.

**W. OUKO
JUDGE**