



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISC. CIVIL APPLICATION NO. 534 OF 2002**

**IN THE MATTER OF AN APPLICATION BY BANKING INSURANCE AND FINANCE UNION (BIFU) KENYA FOR ORDERS OF CERTIORARI AND MANDAMUS AGAINST THE REGISTRAR OF TRADE UNIONS TO QUASH THE DECISION OF THE REGISTRAR OF TRADE UNIONS REGISTERING AMENDMENTS TO THE CONSTITUTION OF KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERS**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE REGISTRAR OF TRADE UNIONS.....RESPONDENT**

**AND**

**KENYA UNION OF COMMERCIAL**

**FOOD AND ALLIED WORKERS.....INTERESTED PARTY**

***Ex parte***

**THE BANKING INSURANCE AND FINANCE UNION (BIFU) KENYA**

**JUDGEMENT**

**A. THE BASIS OF THE JUDICIAL REVIEW APPLICATION**

By Chamber Summons dated 15<sup>th</sup> May, 2002 the Applicant had sought *leave* to file an originating motion for judicial review, and the same was granted by the Honourable **Mr. Justice Kuloba** on 16<sup>th</sup> May, 2002. The Notice of Motion dated and filed on 4<sup>th</sup> June, 2002 followed, being brought under Order LIII, rule 3 of the Civil Procedure Rules and the Law Reform Act (Cap. 26).

The Applicant's substantive prayers were for:

- (a) an *order of certiorari* to remove into the Court and to quash the decision of the Registrar of Trade Unions made on 30<sup>th</sup> November, 2001 allowing and registering amendments to the constitution of Kenya Union of Commercial, Food and Allied Workers (KUCFAW);
- (b) an *order of mandamus* directing the Registrar of Trade Unions to cancel the alterations in the constitution of Kenya Union of Commercial, Food & Allied Workers (KUCFAW) set out and submitted in the said Union's Notice of Alteration of Rules dated 24<sup>th</sup> July, 2001 to the said

Registrar.

Grounds in support of the application were set out in the Statement attached to the earlier application by Chamber Summons for leave to initiate judicial review proceedings. The detailed grounds may here be summarised. BIFU was registered as a trade union on 7<sup>th</sup> May, 1986 and its operations are governed by its registered constitution. The union was registered to cover specific areas of trade unionism which were found to be not effectively catered for by the then-existing unions. Rule 3 of BIFU's constitution, which relates to membership, states:

**“All employees of any Bank, Insurance, Building Society, Savings and Credit Society (Sacco) and Financial Institution carrying on business in the Republic of Kenya, provided such employee is above the apparent age of 16, shall be eligible for membership of the union”.**

Over the years BIFU has enrolled new members from the areas of occupation specified in its constitution, and currently it is engaged in representing its members in industrial matters. Among the banks, insurance undertakings, sacco and financial institutions covered by BIFU are:

- (i) the Insurance Group of the Federation of Kenya Employers (FKE);
- (ii) member banks of the Kenya Bankers Association;
- (iii) Ufundi Savings and Credit Society;
- (iv) Tena Savings and Credit Society;
- (v) Nafaka Savings and Credit Society;
- (vi) Muranga Teachers Sacco;
- (vii) Elimu Savings and Credit Society;
- (viii) Embu Farmers Sacco Society;
- (ix) Asili Co-operative Savings and Credit Society;
- (x) Afya Sacco Society Ltd;
- (xi) Mwalimu Savings and Credit Society;
- (xii) Jamii Co-operative Society Savings and Credit Ltd;
- (xiii) CIS;
- (xiv) Corporate Insurance Co. Ltd;
- (xv) Harambee Sacco;
- (xvi) E.A. Building Society.

The Applicant, which currently has some 8,000 members, has found out that *its members are being recruited by a different trade union*, known as Kenya Union of Commercial, Food and Allied Workers (KUCFAW). On investigating this development, BIFU discovered that *KUCFAW's original constitution has been amended to enable it to make membership forays into occupational areas hitherto not allowed*. The said amended KUCFAW constitution, and with regard to potential membership targets, now reads:

“all employees in warehouses and merchandise, flour mills, food and fruit processing industries,

cereals and seed companies, **banks, insurance, financial institutions**, dairy workers, dairy co-operative societies, pyrethrum co-operatives, rice millers, slaughter houses and meat processing plants, cooking oil refineries, watchmen organizations, data companies, **mineral water and national water conservation**, farmers co-operative societies, **saving and credit co-operative societies**, coffee factories, coffee research employees, **Fosa, building societies, statutory boards, National Hospital Insurance Funds, National Social Security Funds, Kenya Revenue Authority**, Kenya Bureau of Standards, Duty Free Shops, Horticultural Exporters, **property management** and cleaning services, general distributors, beer, soda, tobacco, cinema, show grounds, shop workers, wholesalers and retails and supermarkets.”

With such an *enormously expanded list of potential membership areas*, the said KUCFAW has *expanded its sphere of trade unionism to areas already covered by BIFU*; and it is the Respondent who, on 30<sup>th</sup> November, 2001 *allowed and registered such an expanded mandate*. The Respondent was acting on a Notice of Alteration of Rules, issued by KUCFAW and dated 24<sup>th</sup> July, 2001. The said notice attributes itself to a general meeting said to have been held on 21<sup>st</sup> July, 2001. The notice was lodged with the Registrar of Trade Unions on 18<sup>th</sup> October, 2001.

The foregoing background clarifies the Applicant’s gravamen. *The whole purpose of judicial review as a relief process is that it seeks to ensure good administration, in accordance with the law. Those who manage public offices, are entrusted with public duties which they must perform in a regular and lawful manner, and in that task they must desist from distortions, misdirections, high-handedness or corrupt decision-making.* In the instant application the Applicant has come before the Court complaining that the Registrar of Trade Unions, while engaged in the public duties of his office, has fallen into the censurable errors of breaking the law, taking wrong decisions and abusing the discretion entrusted to him in the public cause.

It is on the basis of those charges, and depending on the findings of this Court, that the Registrar’s decisions will stand or fall. Although interested parties have filed their depositions hoping these can determine if the Court will quash or uphold the Registrar’s decisions, there is *only one proper question in law, namely, has the Registrar made his decisions regularly and in accordance with the law? If his acts and decisions are wrong-headed and are in violation of the law, then they will be quashed, and appropriate further orders made*, and the private interests and preferences of others will then not carry so much weight. And if the Registrar’s decisions comply with the law and are overwhelmingly regular and proper, then they will be upheld.

## **B. DEPOSITIONS OF THE REGISTRAR OF TRADE UNIONS**

The focal point in these proceedings is the decision which was taken by the Registrar on 30<sup>th</sup> November, 2001 allowing amendments to the constitution of KUCFAW, *in consequence of which KUCFAW has claimed membership in numerous occupationally unrelated fields*. Did the Registrar take this decision regularly and lawfully, or how does he account for the decision?

**Mr. William Kibet Langat**, the Assistant Registrar of Trade Unions swore and filed his replying affidavit on 22<sup>nd</sup> July, 2002. He deposed as follows:

(i) on 18<sup>th</sup> October, 2001 he received a *notification of amendments to the rules and the constitution of KUCFAW, following an Annual Conference of that trade union held at Kamunde Hall in Meru, on 21<sup>st</sup> July, 2001;*

(ii) the said Annual Conference had resolved to amend certain rules in the constitution of KUCFAW;

(iii) the amended copy of the KUCFAW constitution was filed with the Registrar on 18<sup>th</sup> October, 2001;

(iv) the Registrar counter-checked the amended rules against the earlier version of the rules, and “found ... that the amendments were consistent with the Trade Unions Act (Cap. 233) and there being no objection went ahead and registered the amendments on 30<sup>th</sup> November, 2001;”

(v) the complainant, namely BIFU, *did not raise and “has never raised any objection before the Registrar, against the registration of the amendments to the Union’s constitution”;*

(vi) the union (KUCFAW) did write to the Registrar giving reasons for the delay in lodging the amended rules, and “the Registrar after considering the said reasons went ahead and exercised his discretionary powers as conferred by section 2(2) of the Trade Unions Act (Cap. 233)”;

(vii) the Registrar in registering the said amendments “exercised his powers *reasonably and justifiably in accordance with the provisions of the Trade Unions Act (Cap. 233).*”

No doubt, I will keep returning to the affidavit of the Registrar. There are two basic questions which I must keep in mind:

(a) Is it a serious and genuine statement that the Registrar, before allowing amendment to the KUCFAW constitution, “counter-checked the amended rules against the earlier version... and found that the amendments were consistent with the Trade Unions Act (Cap. 233)”?

(b) Is it a valid statement by the Registrar that a basis for registering the amended rules was that *there was no objection?*

A further question will also be kept in mind. Was it the case that *delay in the lodgement of the proposed rule-amendments had good reasons, and that “the Registrar after considering the said reasons went ahead and exercised his discretionary powers as conferred by Section 2(2) of the Trade Unions Act (Cap. 233)?* And, is it a valid statement, that the Registrar in registering the rule-amendments, “exercised his powers *reasonably and justifiably in accordance with the provisions of the Trade Unions Act (Cap. 233)?*”

### **C. DEPOSITIONS OF THE INTERESTED PARTY**

Several affidavits have been sworn and filed by interested parties, and there *is* a reason to consider these. Public offices, such as that of the Registrar of Trade Unions, are required to serve the public, *in good faith and regularly and in accordance with the law.* Interested parties, in this regard, may be seen as part of the constituent elements in “the public” as a category. Therefore, in an attempt to appreciate the quality of public service delivered by those such as the Registrar of Trade Unions, it is in every respect proper to take the views of such interested parties as may be minded to express themselves on the pertinent questions.

The then Secretary-General of KUCFAW, the **Hon. Jolly Joseph Mugalla, M.P.** swore and filed a replying affidavit on 1<sup>st</sup> August, 2002. He avers that KUCFAW was registered as a trade union on 3<sup>rd</sup> November, 1965 and its activities are *governed by its registered constitution.* He depones that since 1965 KUCFAW’s membership has been drawn from *various industrial groups which include banks, insurance companies, financial institutions, building societies, co-operatives and statutory boards.* He avers that on 21<sup>st</sup> July, 2001 “KUCFAW held its annual general meeting, during which... members passed a resolution to amend several rules in its constitution, including rule 3 ... [which] relates to membership representation, entrance funds and monthly subscriptions.” The Notice of Alteration of Rules dated 24<sup>th</sup> July, 2001 was forwarded to the Registrar of Trade Unions on 18<sup>th</sup> October, 2001: “*However, by a letter dated 9<sup>th</sup> October, 2001 forwarding the said Notice, the delay in submitting the ... Notice was explained to the satisfaction of the Registrar*” (para.8). On the attempt to expand KUCFAW’s areas of potential membership, the deponent states (para.10):

**“THAT the amendment to Rule 3 of KUCFAW’s constitution was not intended to unlawfully encroach [on] and/or adversely affect... the areas covered by BIFU’s constitution as alleged**

by the Applicant. *The amendment was merely intended to succinctly express and state KUCFAW's areas of coverage.*"

The deponent further states (para.11):

**"THAT further, KUCFAW's constitution registered with the Registrar of Trade Unions in 1965 made provision for its membership to be drawn from *inter alia* banks, insurance companies, financial institutions, co-operative societies, building societies and statutory boards. These industrial groupings were not introduced by the amendments passed by the members on 21<sup>st</sup> July, 2001 as alleged by the Applicant."**

He avers as well that KUCFAW has not at any time used compulsion to get any institution to enter into recognition agreements with it, by filing disputes with the Registrar or the Minister for Labour. In his words (para.14): *"All recognition agreements between KUCFAW and employers are entered into pursuant to mutual agreement based on voluntary negotiations."*

There could have been many more interested parties. The firm of M/s. Orowe & Co. Advocates, on 2<sup>nd</sup> August, 2002 filed an application by Notice of Motion, under Order L, rules 1, 2 and 3 of the Civil Procedure Rules seeking to have some eight such parties enjoined. This application was, however, dismissed by the Honourable Mr. Justice G.B. M. Kariuki when on the scheduled hearing date, 16<sup>th</sup> October, 2003 counsel for the Applicants was not in Court.

#### **D. SUBMISSIONS FOR THE APPLICANT**

On the occasion of hearing, on 18<sup>th</sup> May, 2004 the Applicant was represented by **Mr. Wandabwa** who held brief for **Mr. Nowrojee**; the Respondent was represented by **Mr. Wanga**; the Interested Party was represented by Mr. Githinji.

Learned counsel, **Mr. Wandabwa** drew my attention to the BIFU constitution, rule 3A, which thus provides:

**"All employees of any Bank, Insurance, Building Society, Savings and Credit Society (Sacco) [or] Financial Institution carrying on business in the Republic of Kenya provided such employee is above the apparent age of 16 shall be eligible for membership of the union."**

He submitted that the specified occupational areas, as the field of membership-sourcing, were *confirmed in an agreement. The said agreement was identified as represented in Industrial Court Cause No. 75 of 1999* where the claimant was Banking Insurance and Finance Union (K) (BIFU), the Respondent Kenya Bankers (Employers) Association, and the Interested Party, Kenya Union of Commercial Food and Allied Workers (KUCFAW). The Industrial Court's Award in that cause may be partially set out as follows:

**"The Claimants were registered as a trade union on 7<sup>th</sup> May, 1986. Thereafter a long and bitter struggle ensued culminating in a decision by the Court of Appeal upholding the Registrar of Trade Union's decision to register the Claimants.**

**"The decision of the Court of Appeal was handed down on 15<sup>th</sup> July, 1994 thus bringing to an end eight years of legal battles between the Claimants, the Interested Party and the Registrar of Trade Unions.**

.....

**"Once the Court of Appeal made its decision in favour of the Claimants' registration as a trade union, the Claimants embarked on a campaign to recruit bank employees but did not meet with much success. But following the bank employees' strike in 1998...the Claimants took advantage of bank employees' frustration to enrol the bank employees in droves into**

their membership. There was a massive shift in membership in favour of the Claimants.

“This led to a bitter dispute between the Claimants and the Interested Party...

“The Claimants submitted that in fulfilment of the provisions of Section 5(2) of the Trade Disputes Act (Cap. 234)...they surpassed the ‘simple majority rule’ in December, 1999 by recruiting 53% of the total unionisable employees in the service of member banks of the Respondents while the Interested Party had 27%...

*“[The Claimants] prayed the Court to find that they are the proper trade union with the undisputed simple majority of membership in the Respondents’ member banks and as such they are the sole union that is entitled to be recognised by the Respondents.*

.....

“The Respondents’ prayer is that while looking for a lasting solution to this very unfortunate rivalry between the Claimants and the Interested Party, the Court should award in favour of the union that deserves recognition, having regard to the law, the Industrial Relations System and practice in Kenya...

....

“[The Interested Party] prayed the Court not to award the Claimants to be the sole recognised representative of the workers employed by the member banks of the Respondents as they, the Interested Party, still had a role to play on behalf of their members working for the banks.

“The Interested Party suggested a form of dual representation whereby they as the recognised trade union can deal with issues such as grievances while the Claimants can negotiate economic disputes as well as handling grievances on behalf of the members.”

This background sheds light on the *award which the Industrial Court then proceeded to make*. It comes through in the following excerpt:

“The [Industrial] Court has given very anxious and careful consideration to this dispute where one pioneer trade union which has represented the bank employees before and since independence with great success both in collective and individual claims is pitted against a specialised trade union for Financial Houses which was registered in [the] mid-eighties but struggled to come into operation until after the matter had gone to the Court of Appeal.

“From the facts of this dispute it is clearly proved that the Claimants now enjoy more than a simple majority of the bank employees in their membership. This major shift of membership in favour of the claimants was brought about by the 1998 unlawful strike by... bank employees on the issue of Fringe Benefits Tax after they accused the Interested Party of not supporting them in the strike.

“Be that as it may, the fact is that *now the Claimants enjoy more than a simple majority of bank employees in their membership and they are a specialised trade union for banks, insurances, building societies and other financial institutions.*

“The Court has looked into the issue of granting dual recognition both to the Claimants and the Interested Party and has come to the conclusion that it would not be a practical proposition and would lead to confusion and chaos in the banking industry. Moreover it will be against the existing norms and practices of our industrial relations system.

.....

***“The Court has the extremely painful decision to make in this dispute, because the Interested party after more than nearly forty (40) years must lose its relationship with the Respondents.***

***“The Court awards that the Recognition Agreement between the Interested Party and the Respondents should cease after a period of three months from the date of this award....***

***“On the expiry of the three months’ period, the Claimants and the Respondents must enter into a Recognition Agreement which should be the same in content and purpose as the existing one between the Respondents and the Interested Party.”***

The main thrust of learned counsel, **Mr. Wandabwa’s** submission based on ***Industrial Court Cause No. 75 of 1999*** is that it declared a certain status quo in industrial relations; and *in that status quo the legitimate, and indeed the lawful, trade union in the banking, insurance and financial sector was the Banking Insurance and Finance Union (BIFU) Kenya, and thus all public officials such as the Registrar of Trade Unions would be acting improperly or even illegally if they contradicted that position.* The effect of the verdict given by the Industrial Court in favour of the Applicant, in the said Cause No. 75 of 1999 is that *employers in the relevant sectors were required to enter into recognition agreements with the Applicant and not with the Interested Party.* “Recognition agreement” is defined in Section 2 of the Trade Disputes Act (Cap. 234) as follows:

***“...an agreement in writing made between a trade union and an employer or organization of employers which provides (subject to such terms and conditions as may be contained therein) for the recognition of the trade union as the body entitled to represent the interests of those of its members who are specified in the agreement and who are or have been employed by the employer or any of the employers comprising that organization.”***

What, in law, is the effect of the decision in the said ***Cause No. 75 of 1999***, given the fact that it *does not emanate from the normal judicial system?* By answering this question the issue of legality becomes clear, and so it is possible thereby to judge the *regularity and quality of the impugned acts or decisions of the Registrar of Trade Unions.*

The Kenya Parliament, through the Trade Disputes Act (Cap. 234) has created *the Industrial Court* and conferred upon it a *specialised jurisdiction in matters of labour relations.* The Industrial Court hears and determines the complex questions relating to employer-employee agreements, and *makes awards which must be respected by the parties concerned.* Section 17 of the Act thus provides:

***“17. (1) The award or decision of the Industrial Court shall be final.***

***(2) The award, decision or proceedings of the Industrial Court shall not be questioned or reviewed, and shall not be restrained or removed by prohibition, injunction, certiorari or otherwise, either at the instance of the Government or otherwise.”***

It is quite evident that the *Kenya Parliament intended the Industrial Court to make awards such as the one which it did make, in Cause No. 75 of 1999, and delivered on 3<sup>rd</sup> July, 2000.* The effect of that award was to place the Applicant herein, BIFU, in a position of monopoly in representing workers in the broader financial sector, and the Industrial Court intended precisely that. In the light of the provisions of the Trade Disputes Act above-quoted, good administration in the office of the Registrar of Trade Unions requires *full compliance with the position taken by the Industrial Court.* For it is clearly stated in Section 17(2) of the Act that the *Government has no powers to contest that Court’s decisions whether through judicial review or otherwise; and the corollary must be that those employed in Government offices, such as the Registrar of Trade Unions, cannot subtract from the full effect of the Industrial Court’s awards through purported decisions that tend to weaken the scope or vitality of such awards.*

From the depositions and from the Industrial Court’s award of 3<sup>rd</sup> July, 2000, it is not to be doubted that the Interested Party had previously performed the industrial relations role now recognised to belong to the Applicant, even well before the Applicant came to life. But change has now taken place, and the

recognised trade union in the larger financial sector is the Applicant. Yet, as learned counsel, **Mr. Wandabwa** contends, the Interested Party has been allowed by the Respondent to amend its constitution so as to give itself formal authority to operate as a trade union in the same larger financial sector which the Industrial Court has by its award recognised as falling to one and only one union, namely the Applicant. I have to state in straight terms that the Registrar would, in those circumstances, have deviated from a proper understanding and application of the powers entrusted to him, and consequently his decision would be amenable to the quashing orders of this Court. This *remains* so even if it is argued, as is quite plausible, that the sphere of employer-employee agreements is substantially dependent on that which is *feasible*; after all the Interested Party had been the trade union dealing with such relations in the financial sector long before the amendments to the constitution now in question were made. *It remains* so because the *Parliament of Kenya has clearly identified industrial relations as a complex area of national activity, and has established a special legal regime on the subject. Compliance with that legal regime is an inseparable element in good administration.*

The Applicant also impugned the Registrar's conduct by citing non-compliance with Section 36(2) of the Trade Unions Act, which requires that *every amendment of a rule of a trade union be submitted to the Registrar within seven days of its adoption. The impugned amendments were lodged with the Registrar 89 days after they were adopted.* It was submitted that the Registrar, in admitting the amended rules, acted **ultra vires** the Act, and that as he had no authority to extend the time, *there were no valid amendments-to-rules before him which he could register*; and consequently he acted without jurisdiction. Counsel prayed that the decision to allow the said amendments be quashed; and that an order of mandamus be issued ordering the Registrar to cancel the registration of the amended rules.

**Mr. Wandabwa** has also contested the action of the Registrar of Trade Unions on the basis of the provisions in Section 36(3) of the Trade Unions Act. That section empowers the Registrar to -

**“refuse to register any amendment or alteration of the rules of a trade union if he is satisfied that, by reason of the amendment or alteration, the trade union seeks to represent interests the whole or a substantial proportion of which are in his opinion sufficiently represented by any other trade union already registered.”**

Now although this is a power in the hands of the Registrar, it must be assumed that it will be exercised *conscientiously*, knowledgeably and in *good faith* - for the reverse would amount to an abuse and would on that account be liable to be quashed. From the facts in these proceedings, it cannot be doubted that *BIFU (the Applicant) had been duly registered in 1986 and that this was within the knowledge of the Registrar*; and similarly it cannot be doubted that the *Registrar was aware of the Industrial Court's award in Cause No. 75 of 1999, given on 3<sup>rd</sup> July, 2000.* That award had placed responsibility for financial sector employee matters squarely in the hands of the Applicant. It must follow that the *Registrar, by showing oblivion at this factual and legal position, was involved in a miscarriage of his functions*; and this would make his decision amenable to the quashing orders of this Court.

Counsel also submitted that when, in the circumstances described above, the Registrar proceeded to allow amendments to the rules of the Interested Party, to empower it to dabble in financial-sector trade unionism, he was *in breach of the principles of natural justice*, as he gave no *notice* to the Applicant whose views should have been taken into account. This submission is not an immaterial one, particularly in view of the fact that it was well known to the Registrar that the Industrial Court had already accorded the Applicant the mandate of managing trade union matters in the wider financial sector. It is pertinent in this regard, as counsel also noted, that the Registrar assigned *no reasons for taking a decision that clearly appeared subject to question.* I have to state here that a public officer entrusted with decision-making is not allowed the frill of dithering, or deliberate muteness as cover for self-serving, or inscrutable or lowly grounds of decision. The case of **Re Hardial Singh & Others** [1979] KLR 18 shows that the shortcomings of a decision by a public officer will only be readily noticed where *reasons* have been given. And so *reasons must be seen as an important aspect of good and regular decision-making in public office.*

## **E. SUBMISSIONS FOR THE INTERESTED PARTY**

Learned counsel for the Interested Party, **Mr. Githinji** contended that the charge was misplaced, that the amendments which had been made to KUCFAW's constitution were aimed at circumventing the award made by the Industrial Court on 3<sup>rd</sup> July, 2000. He contended that the award *did not embody a requirement that KUCFAW could no longer recruit members*.

This argument may be logical so far as it goes; but it misses the point, with respect, that the field of labour relations is comparably centralised, with important players within Government and within statutory bodies. The role of the Industrial Court, thanks to the Trade Disputes Act (Cap. 234), is crucial as it *validates the modes of dispute resolution* adopted by employers and employees. The Industrial Court has an overwhelming role in dispute settlement and in the legitimisation of agreements made in the labour relations sector. Therefore, when the Industrial Court recognises a particular union as the representative one in respect of a certain occupation, *its position is to be upheld as the valid legal position*. And such recognition, in the instant matter, had been bestowed upon the *Applicant* and not the Interested Party. If, in these circumstances, the Interested Party perceived itself as still a proper representative of workers in the broader financial sector, this would remain at the *private level* but should not be asserted through the registration of formal, new "constitutional" clauses which stood as a naked challenge to the award of the Industrial Court.

On the Applicant's claim for natural justice, when the Registrar took the decision to approve the Interested Party's amendments to its rules, **Mr. Githinji** contended that the Applicant had no such rights. It is already clear that I do not, with respect, agree. The rule of natural justice ordains that a party whose rights or legitimate interests stand to suffer in the course of public decision-making, *is to be accorded a hearing*. As I have already indicated, the Applicant did have more than ordinary legitimate expectations that it bore the responsibility for workers' interests in the wider financial sector. Any limitations to such expectations which indeed, were founded on the award of the Industrial Court, should have been effected in the context of a proper notice served on the Applicant. As this was not done, I would hold that an important element in the application of natural justice was sacrificed by the Registrar of Trade Unions. The Registrar had, in the circumstances obtaining, a duty to act fairly. He failed in that duty.

In my view, the submissions of counsel were not well targeted, as the Respondent himself, the public officer whose decision was sought to be quashed, had no more than a nominal presence in Court. It may not be unreasonable to take the position that it did not quite matter to the Registrar of Trade Unions, whether or not his decision was quashed; and this may be regarded as some proof that he had not acted out of conviction or sense of public duty, just as learned counsel, **Mr. Wandabwa** submitted.

## **F. FINAL ANALYSIS AND ORDERS**

In the course of reviewing the submissions of learned counsel, I have reached the clear conclusion that the amendments made to the Interested Party's constitution had *no rational purpose* other than to create an appearance of legitimacy for questionable rivalry in membership recruitment, with the Applicant. The fact that the Registrar of Trade Unions proceeded to allow and to register such amendments, though without giving any reasons, would raise genuine concern that he knew he was not exercising the powers of his office in good faith, or with a sense of public duty.

The action taken by the Registrar was irregular, because he very well knew of the Industrial Court's award in **Cause No. 75 of 1999**, rendered on 3<sup>rd</sup> July, 2000 an award that made it crystal-clear that the one trade union that would be recognized as the representative of workers in the wider financial sector, was *the Applicant*.

The Registrar of Trade Unions pleads that he had a discretion to excuse a delay of 89 days in submitting the intended rule-amendments to him for consideration and appropriate action. That discretion, I have to emphasise, was a public trust; and he could not cloud the manner of its exercise in dead muteness. I hold that he is to be taken to have abused that discretion, and so his exercise of power was entirely irregular.

I raised two questions earlier. Is it a serious and genuine statement that the Registrar, before allowing amendment to the KUCFAW constitution, "counter-checked the amended rules against the earlier

version...and found that the amendments were consistent with the Trade Unions Act (Cap. 233)?”

What the Registrar claims to have done, with due respect, carries hardly any content that could be a cogent justification for the very important decision that he took. I must, therefore, say he has not given a proper justification for what he did.

Is it a valid statement by the Registrar that a basis for registering the amended rules was that *there was no objection*?

If the Registrar appreciated the importance of receiving objections, then he would have issued *notices*. Did he give notices? To whom? From the Applicant’s side it is clear that no notice was given before the Interested Party’s rule –amendments were approved. The Registrar has made *no depositions that he did give such notice*. The Interested Party (but not the Registrar) insists that the Applicant was by no means entitled to notice; and I think this means *no notice was given*.

So, how could there have been an objection? The most likely person on earth to raise an objection would have been *the Applicant*. He received no notice; so naturally he made no objection at that stage.

Finally, is there then a basis for the decision that was taken by the Registrar of Trade Unions, to allow and to register amendments to the rules placed before him, thus authorising the Interested Party to conduct active trade unionism in a sphere dedicated to the Applicant by an award of the Industrial Court? I think there is none. And accordingly I will make the following orders:

1. **THAT an Order of Certiorari be and is hereby issued to remove into the Court and quash the decision of the Registrar of Trade Unions made on 30<sup>th</sup> November, 2001 allowing and registering an amended constitution of Kenya Union of Commercial, Food and Allied Workers (KUCFAW).**
2. **THAT an Order of Mandamus be and is hereby issued directing the Registrar of Trade Unions to cancel the alterations in the constitution of Kenya Union of Commercial, Food and Allied Workers (KUCFAW) set out and submitted in the said Union’s Notice of Alteration of Rules dated 24<sup>th</sup> July, 2001.**
3. **THAT the Respondent and the Interested Party shall bear the costs of these proceedings.**

*Orders accordingly.*

**DATED and DELIVERED** at Nairobi this 4<sup>th</sup> day of February, 2005.

**J. B. OJWANG**

**JUDGE**

**Coram: Ojwang, J.**

**Court clerk: Mwangi**

**For the Applicant: Mr. Wandabwa, instructed by M/s. Pheroze Nowrojee Advocates**

**For the Respondent: Mr. Wanga, instructed by the Hon. The Attorney-General**

**For the Interested Party: Mr. Githinji, instructed by M/s. Muthoga Gaturu & Co. Advocates**