



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
Civil Appeal 215 of 1997

DAVID MWENDO & OTHERS.....APPELLANTS

versus

REGISTRAR OF TRADE UNIONS..... RESPONDENT

JUDGMENT

The Appellants in this matter are said to be individuals exercising their constitutional rights under sections 70 and 80 of the constitution of Kenya in seeking to register their trade Union under the name:

"Kenya Hotels Industry Workers Union" referred to in abbreviations as "K.E.H.I.W.U." I have not been given any evidence to the effect that they have been members of any other trade union and it has been emphasized by Dr. Khaminwa, on their behalf, that their Fundamental Rights and Freedom under the constitution should be safeguarded as individuals as the adverse decision made by the Registrar of Trade Unions was made against the Appellants as individuals.

In order to have their aforesaid trade union registered, the Appellants had to apply to the Registrar of Trade Unions to register their union under the provisions of The Trade Unions Act, Chapter 233 Laws of Kenya. Under that Act, the Registrar has the power to grant the application and register the union or to refuse granting the application and therefore not to register the union. In the instant case, the Registrar refused to grant the Appellant's application. It was that refusal that prompted the Appellants to appeal to this court under section 18 of the Trade Unions Act.

On the first day this appeal was scheduled for hearing, that was on 24th September 1998, Dr. Gachuki appeared before me together with Dr. Khaminwa and Mr. Nyabena who is representing the Registrar of Trade Unions. I was told by Dr. Gachuki that he was appearing for the interested parties who had already filed a Chamber Summons dated 23rd September 1998 praying for orders that they be granted leave to be joined to the instant appeal as an interested party and that service of all pleadings be effected on the interested parties within seven days from the date of the order granting leave and that the interested parties do file their appropriate pleadings within 14 days after such service. The words "Interested parties" have been used interchangeably with the words "Interested Party." I will herein adopt use of the latter.

Since the intervention of the Chamber Summons filed by the Interested Party implied that hearing of the appeal on that day was to await the hearing and determination of the Chamber Summons but the Appellant's advocate did not like the appeal to wait, a discussion followed from which a consent order was recorded that hearing of the Chamber Summons was to take place within the hearing of the appeal.

When that was done, it is apparent from what followed that Dr. Gachuki forgot all about the need to file the Interested Party's pleadings as Dr. Khaminwa argued the appeal starting with submissions opposing

the Interested Party's Chamber Summons. I assumed Dr. Gachuki was, at that time, served with pleadings by then filed by the Appellant and the Respondent and would do without filing the Interested Party's pleadings.

Fortunately for the Interested Party, we did not have sufficient time to go for hearing the appeal on that day. After Dr. Khaminwa ended his submissions in opposition to the Chamber Summons he did not go far with his submissions in the Appeal before the hearing was adjourned to 2nd October 1998.

On 2nd October 1998, I was on relief duties at the High Court Nakuru and the Duty Judge here stood over the matter generally.

A mention was subsequently arranged before me for 2nd December 1998 when the parties took a hearing date - 16th December 1998. On that day hearing was adjourned to 10th February 1999 because of the absence of the Advocate for the Interested Party who was to be served.

On the 10th February 1999 therefore all the three advocates were before me. Dr. Khaminwa resumed arguing the appeal. When he ended, Mr. Nyabena started.

Thereafter I was surprised, when it came to Dr. Gachuki's turn, to hear him apply for adjournment so that he could be served with the authorities Dr. Khaminwa had cited and produced on 24th September 1998. That was the only reason Dr. Gachuki gave for his application for adjournment. As I thought he had had too much time since 24th September, 1998 to obtain the authorities which had been cited and supplied to the court in his presence, I rejected his application for adjournment. He subsequently put up very good submissions both for the Chamber Summons and for the appeal and it was not until the time I started writing this judgment that I realised he had not filed the Interested Party's pleadings intended in prayer 3 of the Chamber Summons. No party had complained. I presume he had been served with pleadings filed by the Appellants and the Respondent. I hope no party will complain hereafter as having proceeded with the matter to this stage, I think the best thing I can do is to deliver my ruling in the Chamber Summons within the judgment in the Appeal from whatever is before me which also persuades me that no injustice is being caused to any of the parties in this my ruling and judgment.

Now concerning the Chamber Summons, as in the appeal, Mr. Nyabena and Dr. Gachuki are together against the Appellants. In this matter, Section 70 and Section 80 of the Constitution of Kenya must be read together. Not only are we talking about individuals but we are also talking about those individuals in an assembly or an association. A trade union.

Every person in Kenya is entitled to the fundamental rights and freedoms of the individual, namely, the rights and freedoms to life, liberty, security of the person and the protection of the law, the rights freedom of conscience, of expression and of assembly and association, and the right to protection for the privacy of his home and other property and from deprivation of property without compensation; and whereas those rights and freedoms must be protected, the enjoyment of those rights and freedoms is subject to the limitations that the enjoyment of those rights and freedoms, by the individual does not prejudice the rights and freedoms of others or the public interest.

Since the individuals this judgment is about are individuals trying to register a trade union, their case cannot be fully settled without reference to section 80 of the Constitution of Kenya. The general principle with regard to the right to register a trade union emanates from section 80(1) which protects freedom of assembly and association in Kenya. It gives the people of Kenya the right to form or belong to trade unions for the protection of their interests.

However subsection (2) of section 80 imposes some limitations to the right to form or belong to trade unions by allowing the existence of a law containing provisions for the registration of trade unions, imposing reasonable conditions whereby, among others, registration of a trade union may be refused on the ground that another trade union already registered is sufficiently representative of the whole or of a substantial portion of the interests in respect of which registration of a new trade union is sought. But that limitation is allowed on the basis that the provisions of such a law or anything done under the authority of

that law is shown to be reasonably justifiable in a democratic society. That is the constitution of Kenya.

From the provisions of that constitution, the people of Kenya form a democratic society. The Trade Unions Act, Chapter 233 Laws of Kenya, as a law existing in accordance with section 80(2) of the Constitution, has provisions deemed reasonably justifiable in a democratic society.

In this appeal it is the action of the Registrar of Trade Unions, also referred to as the Respondent under section 16(1) (d) (i) of the Trade Unions Act that must be reasonably justifiable in a democratic Society. The question therefore is whether what he did in refusing to register the Appellant's trade union was reasonably justifiable in a democratic society.

From the submissions before me, it is the Appellant's case that what the Respondent did was not reasonably justifiable in a democratic society. The Respondent says what he did was reasonably justifiable in a democratic society.

Where does the Interested Party come in?

Mr. Nyabena says that the Interested Party comes in under the proviso to Section 16(1) (d) (i) whereby the Registrar is required to seek views of Interested Parties. He argues that it will be inconceivable for Parliament to require a trade union to be heard before the Registrar but when it comes to the stage of an appeal to the High Court, the trade union is not heard. He submits that that will be a breach of the rights of natural justice. He adds that the union is adversely mentioned in the Memorandum of Appeal and should therefore be heard. He says the decision of the Registrar is theoretical. His office does not represent the workers who are represented by the Interested Party namely - the Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and allied Workers.

Dr. Gachuki adopts all that has been said by Mr. Nyabena on the joining of the Interested Party in this appeal and adds that the Interested Party consists of individuals who enjoy constitutional rights and freedoms enjoyed by the Appellants. They have information, they have experience which may be relevant in the determination of the issues involved. The Interested Party substantially represent the interests of the Applicants and since the Applicants are setting on fire the house of the Interested Party, the Interested Party should be allowed to put off that fire. They were before the Registrar and have the right to be here.

Dr. Khaminwa does not agree with what counsel for the Respondent and counsel for the Interested Party are saying. He insists the Interested Party was not before the Registrar as a party and should not be here as the case is not being started here. Before the Registrar the Interested Party was a mere witness and witnesses are not being called in this appeal.

I have carefully considered all the submissions on the issue. It is of interest to note that it is being said the Interested Party was before the Registrar of Trade Unions yet the same party is here now applying to be joined in the proceedings. It means that when the Party was before the Registrar, it was before him in a capacity other than a party. Otherwise the Chamber Summons here would not have been necessary and if the Chamber Summons would have been necessary it would have stated the capacity in which the Interested Party appeared before the Registrar. The court has not been told whether the Interested Party was before the Registrar as an Applicant or as a Respondent.

It is only as an Applicant or as a Respondent before the Registrar that the Interested Party would have been entitled to be a party to this appeal.

The evidence before me is that the Interested Party was a mere witness before the Registrar of Trade Unions. A witness through correspondence whereby the Interested Party's views were sought for the purpose of enabling the Registrar make his own independent decision. Normally no witness appeals against a decision in the case in which he has given evidence. No such a witness becomes a Respondent in an appeal against such a decision. He does not become an Appellant. This was one of those normal cases. That is why the Federation of Kenya Employers, The Central Organization of Trade Unions and the Ministry of Labour, who were also witnesses in the instant case, have not come forward to apply to be

joined in this appeal.

For a party to be joined in a case, that should be done at the initial stage when the case is starting. This is true whether the matter is criminal or civil. The Interested party should therefore have applied to be joined in this case when the matter was still before the Registrar of Trade Unions if the Interested party thought was entitled to join.. Since that was not done, it is not only too late, but also procedurally wrong to be joined at this appellate stage.

It is the decision of the Registrar of Trade Unions which is being questioned in this appeal. He was not sitting together with the Interested Party. The appeal is specifically provided for under section 18 of the Trade Unions Act which has nothing to *do* with interested Parties. Only two parties are mentioned. The Registrar who has refused to register a trade union and the aggrieved person who must be the applicant whose application to register the Union has been refused by the Registrar.

The Registrar may or may not have consulted certain institutions. But the decision he makes is his decision and if appealed from, the institutions consulted or not consulted before that decision was taken have no right to become parties to that appeal. Had Parliament intended such institutions to become parties, Parliament could easily have included relevant provisions in the Act and I am sure Mr. Nyabena who has represented the Registrar of Trade Unions in many of these kind of appeals would have showered me, not only with case authorities where Interested Parties were joined but also with relevant statutory provisions from the Trade Unions Act before he concluded that breach of the rules for natural justice will result if Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers is not joined as a party to this appeal. He would not therefore have bothered referring to section 16 (1) (d) (i) which says nothing about appeals. That is the position despite the fact that Parliament in its wisdom must have known that some Memorandums of Appeal could adversely mention some of the trade unions invited to give views, especially where such a trade union raised an objection to the registration of the Appellant's proposed trade union.

From the foregoing, it follows that I must reject the Chamber Summons herein dated 23rd September 1998 and filed by the interested Party. The same be and is hereby dismissed with costs to the Appellants.

I now remain with the appeal the hearing of which counsel for the Interested Party has participated in without having filed pleadings which, in accordance with the dismissal of the Chamber Summons above, he would not have been entitled to file.

I may repeat what I said earlier that in terms of the provisions of the law, the Appellants are saying that the Respondent did not do what is reasonably justifiable in a democratic society while the Respondent is saying that what he did was reasonably justifiable in a democratic Society. Both sides are looking at section 16

(1) (d) (i) of the Trade Unions Act including the proviso which, in so far as is material in this appeal, reads as follows:

"The Registrar may refuse to register any trade union... if he is

satisfied that:-

(d) any other trade union already registered is -

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

Provided that the Registrar shall, by notice in the Gazette or otherwise, notify any registered trade unions which appear to him to represent the same interests as the applicants of the receipt of such application and shall invite the registered trade unions concerned to submit in writing within a period to be specified in the notice any objections which any such trade unions may wish to make against the registration."

There is no doubt that the Respondent complied with the above proviso by notifying a registered trade union, which appeared to him to represent the same interests as the Applicants, of the receipt of the Application from the Applicants and invited the said registered trade union; namely the Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers; to submit in writing any objections which the said registered trade union wished to make against the registration of the Applicants' intended trade union. There is no dispute that there was response from the said registered trade union and that in that response, the registered trade union objected to the registration of Kenya Hotels Industry Workers Union.

That was all the Registrar was required to do under the provisions of the Trade Unions Act. The objection he received from the registered trade union added to the material he was looking at such as the constitution of the proposed trade union compared to the constitution of the registered trade union together with the other relevant documents required under the Trade Unions Act.

Those were sufficient to enable the Registrar make a decision whether or not to refuse registration of the proposed trade union within the confines of sections 70 and 80 of the constitution of Kenya and section 16(1) (d) (i) of the Trade Union Act bearing in mind that his decision had to be reasonably justifiable in a democratic society.

But I have been told that besides those provisions, the Registrar of Trade Unions went outside to invoke the provisions of something called the "Industrial Relations Charter". Under the Charter the Registrar sent to the Ministry of Labour, the Federation of Kenya Employers and the Central Organisation of Trade Unions notifications similar to the one sent to the Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers. Each one of the three bodies responded objecting to the registration of the Appellant's trade union.

I will not discuss the contents of the letters from any of these bodies. But I will try to make a brief comment on the Industrial Relations Charter which was not produced and not discussed though mentioned in some of the documents before me.

Neither the Registrar nor the bodies to which he referred the matter under the Industrial Relations Charter mentioned the provisions of the Trade Unions Act or any other statute under which the existence of the Charter is provided for. The Registrar did not bother to make it known the statute under which he is entitled or empowered or authorised to seek the views of the Ministry of Labour, the Federation of Kenya Employers, and the Central Organisation of Trade Union (Kenya).

It would seem the Charter is an agreement between the Government, the Federation of Kenya Employers and C.O.T.U. I have no information whether the Charter provides for the raising of objections by the three bodies in the same way the proviso to section 16 (1) (d) does in respect of a registered trade union purported to represent the interests of members of the proposed trade union which has applied for registration. If the Charter does not provide for the raising of objections, if for instance the Charter provides for the making of recommendations only, then the objections which the three bodies purported to raise under the Charter in this matter were actually raised Ultra vires the provisions of that Charter. This is because objections are stronger than, and not the same thing as, recommendations.

But as it was said in the case of OTIENO OGORO AND TWO OTHERS VS REGISTRAR OF TRADE UNIONS, H.C. Civil Appeal No. 305 of 1991, (unreported) the Registrar has a discretion to make inquiries from any group of persons before making his decision.

In that case, Chesoni J, as he then was, stated that he had no intention to narrow the field of the Registrar's inquiries and remarked that such inquiries had better be restricted to bodies that are thought to represent the applicant's interests. I adopt that statement as thus will the spirit of the Trade Unions Act in the proviso to section 16 (1) (d) be maintained. If the Legislature meant to include bodies like C.O.T.U. the Federation of Kenya Employers and the Ministry of Labour, the wording of the proviso should not have been so restrictive. The intention of Parliament should not be changed without the necessary statutory amendments.

Look at what the learned judge said further following on the requirement of the proviso to section 16 (1) (d) of the Trade Unions Act that the Registrar notifies any registered trade union which appears to him to represent the same interests as the applicants' interests.

He ruled that C.O.T.U. did not fall in that category of trade unions because it represented interests of trade unions rather than of employees as the individual trade unions do.

That is so and the same can be said of the Federation of Kenya Employers and the Ministry of Labour. The former represents the interests of employers while the latter represents the interests of the Government. They do not therefore come under the provision to section 16(1) (d). That being the position, it is difficult to see the legality of notifying the Ministry of Labour, the Federation of Kenya Employers and C.O.T.U.

In the case of OTIENO OGERO therefore, the court did not put weight to the objection from C.O.T.U. The same can be said in respect of H.C. Civil Appeal No. 25 of 1988 JUMA ABITOYA BAYA AND OTHERS VS THE REGISTRAR OF TRADE UNIONS (unreported). I should treat the objections before me from the Ministry of Labour, from the Federation of Kenya Employers and from C.O.T.U. in the same way objections from those bodies were treated in the cases referred to above. I have no reason to treat them differently. I am therefore ignoring their objections in this matter.

Moreover, since the Industrial Relations Charter is not provided for in the Trade Unions Act, the Charter's legal effect in a matter like this, especially as relates to this kind of appeals, is obscure, if not non-existent, bearing in mind section 70 of the Constitution of Kenya, which recognises other provisions of Chapter V of the said Constitution only, and section 80 of the same Constitution which recognises an existing relevant statute only. For the purpose of refreshing memory, Chapter V of the Constitution of Kenya makes provisions for the protection of fundamental rights and freedoms of the individual, and sections 70 and 80 are found in that Chapter. It follows that in this matter, I get no assistance from objections or recommendations made under the Industrial Relations Charter.

In all the three cases cited above the most important thing was the objection raised by the existing or the registered trade unions. The registered trade unions raised objections. A similar situation obtained in the case of ANGAHA AND OTHERS VS REGISTRAR OF TRADE UNION (1973) E.A. 297. In that case the appeal was dismissed because there were registered trade unions which were sufficiently representative of the whole or of a substantial proportion of the interests in respect of which registration of the Appellant's Trade Union was sought. A similar situation obtained in the case of ATIENO OGERO.

In both cases the people who wanted to register their trade unions had been members of the registered trade unions and the said registered trade unions had raised objections to the registration of the proposed trade unions. The appellants had pulled out of the registered trade unions so that, in effect, were trying to register splinter union.

In the case of JUMA ABITOYA BAY A and the case of JOHN ALUKWE, appeals were allowed despite the fact that the registered unions had objected to the registration of proposed trade union and bodies like C.O.T.U had also objected. In JUMA ABITOYA BAYA, it was held that the Registrar of Trade Unions erred in holding, that there was another union representing the interests of appellants.

This was despite the fact that the registered union had been catering for the interests of the appellants and there had been some negotiations. The learned judge found that the membership did not cover the appellants who were not therefore eligible to join the registered union.

In the case of JOHN ALUKWE AND OTHERS, the appellants were members of the registered trade union but sought to form their own union on the ground that the registered union was not sufficiently representing their interests -many of them were dissatisfied with their membership of their registered union called Domestic and Hotel Workers Union and were resigning. The new union to be registered was called Kenya Bakers and Confectioners Workers Union.

The court found that in refusing registration of the proposed union the Registrar had failed to take into account the interests in respect of which the appellants sought registration i.e. their interests as industrial employees in contradistinction to the interests of the other members of the union. There was no indication that the Registrar considered whether a union composed largely of domestic and hotel workers could sufficiently represent the interests (or substantial proportion of the interests) of bakers and confectioners employed in industry. There was no indication that the Registrar had considered the fact that a large number of such Bakers and Confectioners were so convinced that their interests were not being sufficiently represented that they had resigned from the registered union. It was said:

"The Registrar must exercise his discretion according to the rules of reason and justice and in the spirit of the statute. He cannot make an arbitrary administrative decision." Since he had made an arbitrary administrative decision, the court sent the case back to the Registrar for further consideration taking into account the Court's observations and the fact that the appellants had no objection to joining the Commercial Food and Allied Workers Union.

Returning to the appeal before me the Registrar of Trade Unions refused to register the appellant's trade union stating in his Notification of Refusal of Registration:

"It is hereby notified that the Registration of the Kenya Hotels Industry Workers Union is hereby refused.

The grounds of such refusal are as follows: (1) There is already a registered Trade Union, The Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers which is sufficiently representative of a substantial proportion of the interests of which the Kenya Hotels Industry Workers Union seeks registration." That Notification has no date. It was, however, sent to the Advocates for the Applicants, now Appellants under cover of the Registrar's letter dated 9th July 1997 pointing out that the application by the Appellants had been refused under the provisions of Section 16 (1) (d) (i) of the Trade Unions Act.

By a subsequent letter dated 18th July 1997 the Registrar referred to his letter dated 9th July 1997 and informed the Appellant's Advocates that the notification of refusal of registration should have been dated 9th July 1997 and not 7th February, 1997 as had been advertised in the Kenya Gazette Notice No. 3756 of 18th July 1997.

On 8th August 1997 this appeal was filed. According to section 18 (1) of the Trade Unions Act, such an appeal should be filed within one month of the date of the refusal. The same is said in Rule 2 (a) of the Trade Unions (Appeals) Rules. Although it has been submitted on the side of the Respondent that this appeal was filed out of time, I am not persuaded with that submission as it has not been shown to me how the filing was out of time. I reject submissions on that issue.

Concerning the failure to comply with section 9 of the Trade Unions Act requiring a trade union to apply to be registered as a trade union under this Act within 28 days from the date of its formation, that is not an issue for this court in an appeal like the one before me now. It is an issue which the Registrar should have handled together with or independent of the Appellants application to him for registration. That section is a penal section and the Registrar, if true that the Applicants had failed to apply for registration, could have employed it and thereafter handled their application with that case in mind. From what happened the Registrar handled the Appellant's application as if the Appellants had complied with section 9 and that is why this appeal is before me. I have nothing to do with section 9 in this appeal and submissions on that issue from the Respondents fail as the issue of failure to apply to register is not and should not be before me in this appeal emanating from a refusal by the Registrar to register the Appellant's trade Union following their acknowledged application to register the trade union. The alleged incompetency of that application on the ground that it was filed before the Registrar out of time is not one of the reasons given by the Registrar in his Notification in question in this appeal stating why he refused to register the trade union of the Appellants.

Moving to the issue of the need for an affidavit in support of the memorandum of Appeal, Rule 3(2) of the Trade Unions (Appeals) Rules is mandatory and should not be ignored as it provides clothings to

section 18 of the Trade Unions Act. Since the affidavit is intended to be as to facts only, failure to file such an affidavit though not rendering the appeal null and void, makes the appeal suffer prejudice because the grounds of appeal in the memorandum of appeal are left naked. Perhaps this will be demonstrated better when discussing the memorandum of appeal to which I am now moving.

Ground number one is that the Assistant Registrar erred in holding that the Appellants are adequately represented by the Umbrella Union, Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA WORKERS).

From the case file the memorandum of appeal was filed together with the Registrar's Notification of refusal of Registration; his letter dated 9th July 1997 and his letter dated 18th July 1997 about the Notification; his letter dated 24th April 1997 forwarding copies of objection letters to the Advocate for the Appellants and inviting comments; copies of the letters of objections and an extract of Rule No.3 concerning membership of Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers.

Those are the only documents I would have had before me had the Registrar of Trade Unions not re-acted in the way he has done filing a replying affidavit to which are a number of annexures enabling me see not only the application the Appellants submitted to him but also particulars of each Appellant, the Constitution of the Appellants' proposed trade union, the constitution of the registered trade union and further and generally enabling me get useful evidence so that I can now competently handle the grounds listed in the memorandum of appeal.

With the evidence before me now and in the absence of an affidavit or affidavits of facts from the Appellants, where do I get evidence to support ground number one to the effect that the Registrar erred in his holding that the Appellants were adequately represented? The Registrar's replying affidavit may not have discredited the memorandum of appeal and directions may have been taken without complaint by the Registrar but all those do not remove the failure by the Appellants to file supporting affidavits.

The Registrar keeps and maintains records of registered trade unions. From those records he was able to know and identify a registered trade union which appeared to substantially represent the interests of members of the proposed trade union. He had the constitution of both unions and was able to compare the constitutions and could form his opinion even before he invited objections from the registered trade union which he identified as Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers, but he was obliged to invite their objection. Their objection having been received the Registrar was entitled to make the decision he came to make later without having to wait for comments or objections from anyone else like C.O.T.U. Federation of Kenya Employers, the Ministry of Labour or the advocates for the Appellants. But he still went a head to get comments or objections from them before he made his decision.

In my views evidence before the Registrar, even without objections from C.O.T.U. F.K.E. and Ministry of Labour, and comments from the Appellant's Advocates, was sufficient for him to reach the conclusion that the Appellants are adequately represented by the Umbrella Union the Kenya Union of

Domestic. Hotels and Allied Workers. The constitution of that trade union shows that Kenya Hotels Industry Workers are eligible to be members and there is evidence that they have been and are still members and there is no evidence that the Appellants are not welcome to that membership or have never been such members. Moreover there is no evidence that the Hotel Industry Workers who joined that trade union years ago and have been joining it, did so and have been doing it under duress, threat or undue influence. From all that evidence I do not see the Registrar's error and ground one must fail.

As to ground number two whereby the Appellants are saying that the Registrar erred in accepting objections raised by the Federation of Kenya Employers, I have already said enough about that body's objection and concluded that I am not taking that objection into account in this appeal. That settles that ground as I have also said that the Registrar had sufficient evidence before him to reach the decision he made, without even considering objections and views from C.O.T.U. the Federation of Kenya Employers

and the Ministry of Labour. It follows that there was no failure of Justice even if he took into account those objections and views as the end result, is the same.

With regard to ground three, there is no failure of natural justice as all that the Registrar was required to do was to observe section 16(1) (d) of the Trade Unions Act and indeed he observed those provisions and even did more by inviting comments *on* objections from the appellants advocates. As it was said in the case comments on objections from the Appellants advocates. As it was said in the case of *ANGAHA AND OTHERS VS REGISTRAR OF TRADE UNIONS (1973) E.A. 297*:

"The applicants were heard by way of submissions of their application together with the draft constitution of the proposed trade union in terms of the Act. This was not one of the cases where applicants are required to be heard in respect of any objections. They had the full opportunity both by their application and in the draft constitution to satisfy the registrar that the proposed trade union was qualified to be registered as a trade union under the Act. This they attempted to do but the registrar was not satisfied."

It is a similar situation in this appeal and in the absence of an affidavit from the Appellants which could perhaps have convinced me otherwise, this ground also fails.

With regard to ground four, I think what I said in relation to ground one covers this and extends to cover grounds five and seven. I should add that employees from different interest groups voluntarily garnered and formed the Kenya Union of Domestic, Hotels, Educational Institutions, Hospital, and Allied Workers. It was and still is upon them to work out a constitution which allows withdrawal of an interest group which feels the umbrella trade union no longer serves their interests and therefore wants to withdraw. Perhaps they could change the name of the umbrella trade union and/or amend or alter the membership clause or the trade union rules or constitution to exclude specific group membership while at the same time avoiding the formation of splinter groups. Otherwise it serves no usefull purpose for a group of workers from an industry rushing to court for assistance to register a trade union while their colleagues from the same industry remain members of an already registered trade union.

Grounds four, five and seven each fails.

Ground six also fails because what I said in respect of ground three covers ground six.

Perhaps a supporting affidavit could have helped me see how the specific interests the Hotel Workers under the proposed trade unions have, are different from the interests Hotel Workers under the registered trade union have. Such an affidavit could also have shown how the effectiveness of the registered trade union have is an issue and how the Registrar denied the ~~Applicants~~ a hearing after he accepted their application and acted on it in accordance with the law. The affidavit could also have shown why the Appellants should wake up to-day to question the relevancy of the Hotel Industry being grouped together with Educational Institutions, Hospitals and others under the Umbrella Union, Kenya Union of

Domestic, Hotels, Educational Institutions and Hospitals and Allied Workers after being in that registered trade union for all those many years without raising the question.

In conclusion, I find no vagueness in the list of membership of the proposed trade union as compared to the list of membership of the registered trade union seen from their respective constitutions. For the former, membership of the Union is open to all employees engaged in:

"Hotels, Clubs, Beaches, Resorts, Cafes, Guest Houses, Villages, Cottages, Lodges and Caterings, provided that such employees are of the apparent age of eighteen years."

For the Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers, membership is open to all employees engaged in

"Private houses or homes, flats, apartments, clubs, guest houses, bakeries, sweets and biscuit making factories, hotels, restaurants, casinos, catering and similar establishments providing lodging, food

beverages or both and further categories of related establishments providing Tourism Services, Educational Institutions including Schools, polytechnics, training centers, universities and university colleges, mass media institutions, radios, televisions and recording studios, social services including children and old-age homes, all service non-governmental organisations and projects associated with them, private hospitals including nursing training centers, nursing homes, clinics including dispensaries, religious institutions including Christian churches, Muslim mosques, Hindu temples and all other institutions and projects associated with them provided that such employees are of the apparent age of sixteen years."

There will be overlapping in the spheres of activity if the Kenya Hotels Industry Workers Union is registered.

From the above therefore and on the whole, I am persuaded to agree that the registered trade union is sufficiently representative of the whole or of a substantial proportion of the interests in respect of which registration of the proposed trade union is sought. I hold the view that the refusal by the Registrar of Trade Unions to register the Kenya Hotels Industry Workers Union was reasonably justifiable in a democratic society. The decision was made judicially and therefore the Registrar exercised his discretion properly and this court has no power to interfere when the Registrar has so properly acted.

Accordingly this appeal be and is hereby dismissed with costs to the Respondent Registrar of Trade Unions.

Dated and delivered at Nairobi this 26th day of February, 1999.

J.M. KHAMONI JUDGE