



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISC. CIVIL APPLICATION NO. 298 OF 1986**

**REPUBLIC OF KENYA.....APPLICANT**

**VERSUS**

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

**EX-PARTE -**

**KENYA UNION OF COMMERCIAL, FOOD AND ALLIED WORKERS**

**AND**

**BANKING, INSURANCE AND FINANCE UNION (K) .....INTERESTED PARTY**

CORAM: GICHERU, J.

MUTHOGA, COMMISSIONER OF ASSIZE.

Mr. Jaffer and Mr. Kiraitu for the applicant,

Mr. Kimani Muhoro for the respondent,

Mr. Nowrojee and Dr. Godana for the interested party.

**RULING**

By a Notice of Motion dated 10th July, 1986 and filed in this court on 11th July, 1986 the Kenya Union of Commercial Food and Allied Workers, hereinafter referred to as the applicant, applied to this court for:

1.An Order of Certiorari to be granted to remove the proceedings and ruling before the Registrar of Trade Unions, Nairobi in respect of the application for registration as a Trade Union by the Banking, Insurance and Finance Union (K) and its registration thereafter under the provisions of the Trade Unions Act, Chapter 233 of the Laws of Kenya and all proceedings thereunder be quashed and set aside; and

2.An Order of Mandamus directed to the Registrar of Trade Unions requiring him to cancel the registration of the Banking, Insurance and Finance Union (K).

At the commencement of the hearing of this application, one of the counsels for the applicant, Mr. Jaffer, informed the court that the applicant will not urge for the Order of Mandamus as the Order for Certiorari, if granted will serve the applicant's purposes. The applicant also applied for leave to amend its statement which inter alia set out the relief sought and the grounds upon which the said relief was sought. Leave to amend the said statement was granted and the applicant put in the amended statement which is contained in Document No. 1.

Thereafter, this court brought to the attention of the counsels for applicant the provisions of Order LIII rule 7(1) of the Civil Procedure Rules and queried whether the applicant had complied with the said provisions. An application for adjournment on behalf of the applicant was then made so as to enable it to file a complete record before the Registrar of Trade Unions, Nairobi duly verified. We allowed this application and on 26th November, 1986 the applicant lodged a copy of the proceedings before the Registrar of Trade Unions, Nairobi duly verified by the affidavit of Geoffrey Sammy Muhanji, the National General Secretary of the applicant.

These proceedings were contained in Document No. 5 and it is in respect of these proceedings that the Order of Certiorari was sought before the Registrar of Trade Unions and the Banking, Insurance and Finance Union (K), hereinafter referred to as the respondent and the interested party respectively, raised a preliminary objection to Document No. 5 and submitted that this document did not comply with the provisions of Order LIII rule 7 (1) of the Civil Procedure Rules. In particular, they pointed out that since the proceedings contained in Document No. 5 were not certified by the respondent they were not therefore verified for the purposes of the aforesaid rule. There was therefore, according to them, nothing upon which an Order of Certiorari could be made. They therefore sought for the dismissal of the applicant's application with costs.

Owing to the nature of the applicant's application and in the public interest, we reserved our ruling to the preliminary objection raised by the counsels for the respondent and the interested party. We indicated that the same shall be incorporated in our final ruling in respect of the entire application as is set out above and allowed the hearing of the said application to proceed. This now is our ruling in regard to the said preliminary objection.

The principal ground upon which the counsels for the respondent and the interested party raised the preliminary point mentioned above was that the proceedings in respect of which an order or certiorari was sought were not certified by the respondent and therefore the verifying affidavit of Geoffrey Sammy Muhanji had nothing that it was verifying.

Rule 7 (1) of Order LIII of the Civil Procedure Rules, where relevant in regard to proceedings, requires a copy of the said proceedings verified by affidavit to be lodged with the Registrar of this court before the hearing of a motion for an order of certiorari. This rule does not require that such proceedings should be certified. At any rate, in the present application, neither the respondent nor the interested party disputes that the proceedings contained in Document No. 5 were the proceedings before the respondent when he made the decision to register the interested party as a Trade Union. Having allowed the applicant to file a complete record of the proceedings before the respondent duly verified and the applicant having done so as is mentioned above, we can find no merit in the preliminary objection raised by the counsels for the respondent and the interested party. We therefore overrule the said preliminary objection and accordingly dismiss the same.

We now turn to the applicant's application.

On 2nd December, 1982 a Trade Union known as Kenya Union of Bank Employees, hereinafter referred to as KUBE, applied to the respondent for registration as a Trade Union under the provisions of section 10 of the Trade Unions Act, Chapter 233 of the Laws of Kenya, hereinafter referred to as the Act. On receipt of this application, the respondent, in compliance with the proviso to section 16(1) (d) of the Act wrote to the applicant; to the Central Organization of Trade Unions (Kenya) (COTU); to the Federation of Kenya Employers (FKE); and to the Ministry of Labour notifying them of the application for registration by KUBE and inviting them to submit to him in writing within a period of two weeks

from the date of notification - 14th December, 1982 - objections that they wished to make against the registration of KUBE as a Trade Union if they had any such objections. According to KUBE's proposed constitution and rules, its membership was open to all unionisable employees engaged in the Banking Industry provided that such employees were above the apparent age of 16 years. In response to the respondent's notification referred to above, the applicant, COTU, FKE and the Ministry of Labour submitted in writing to the respondent their respective objections to the registration of KUBE as a Trade Union. They all principally objected to the registration of KUBE as a Trade Union on the grounds that the unionisable employees of the Banking Industry in this country were adequately and effectively represented by the applicant and that splinter Trade Unions should be discouraged.

On 10th January, 1983 the respondent, quite properly, wrote to KUBE enclosing copies of the objections made by the applicant and COTU against KUBE's registration as a Trade Union under the Act and invited KUBE's comments on these objections before a decision was reached on the matter. In response to the respondent's invitation for comments, KUBE wrote two letters addressed to the respondent and dated 17th January, 1983.

In these two letters KUBE pointed out that the applicant was composed of unrelated professions and drew its membership from watchmen, clerks, shopworkers, messengers and odd-job men. According to KUBE, the applicant had no banking experience nor professional know-how to handle Bank and Finance matters. Bank employees, according to KUBE, were a distinct class of their own with special interests which cannot be adequately represented by the applicant. Indeed, according to KUBE, Bank employees' distinctiveness was recognised by Legal Notice No. 124 of 1980 made under the provisions of section 5 B (1) of the Industrial Training Act, Chapter 237 of the Laws of Kenya - The Industrial Training (Banks and Other Financial Institutions) (Training Levy) Order - which classified Banks and Financial Institutions separately from Food Processing and Allied Industries and also separately from Commercial, Distributive and Allied Trades and Industries - see Legal Notices Nos 127 and 131 both of 1980 and made under the aforementioned section. KUBE therefore had a desire to form a professionally orientated Trade Union which understood the Banking Industry and which would curb industrial unrest in the Banking Industry. To KUBE, the applicant had become big and less viable. The applicant had no Assistant Secretary - General to represent Bank employees as was provided for by rule No. 10 (f) of its constitution and rules and such employees depended on Shopstewards for representation. There was no guarantee that good Shopstewards would be re-elected. The applicant's performance at the Industrial Court was, according to KUBE, dismal and its Union Office Administration was poor. Bank employees had therefore lost confidence in the applicant and had withdrawn their membership and their union dues from it. Finally, according to KUBE, its registration was not ultra vires Government Policy or Industrial Relations Charter as other new Trade Unions had since 1965 been registered.

By a letter dated 10th February, 1983 the respondent informed KUBE that its application for registration as a Trade Union had been refused under section 16(1) (d) (i) of the Act. In that letter, the respondent enclosed the notification of refusal of registration which was dated 10th February, 1983 and which, where relevant, read as follows:

"It is hereby notified that the registration of the KENYA UNION OF BANK EMPLOYEES as a trade union under the Trade Unions Act is refused. The grounds of such refusal are as follows:

I am satisfied that another trade Union already registered, namely, the Kenya Union of Commercial, Food and Allied Workers, is sufficiently representative of the whole or of a substantial proportion of the interests in respect of which the Kenya Union of Bank Employees seeks registration."

As is provided for by section 18(1) of the Act, on 9th March, 1983 KUBE lodged an appeal to this court against the respondent's refusal to register it as a trade union. That appeal was discontinued vide a notice of discontinuance made under Order XXIV Rule 1 of the Civil Procedure Rules and dated 4th June, 1985.

"It is hereby notified that another trade Union already registered, namely, the Kenya Union of

Commercial, Food and Allied Workers, is sufficiently representative of the whole or of a substantial proportion of the interests in respect of which the Kenya Union of Bank Employees seeks registration."

As is provided for by section 18 (1) of the Act, on 9th March, 1983 KUBE lodged an appeal to this court against the respondent's refusal to register it as a trade union. That appeal was discontinued vide a notice of discontinuance made under Order XXIV Rule 1 of the Civil Procedure Rules and dated 4th June, 1985.

On 10th May, 1985 the interested party applied to the respondent for registration as a Trade Union under the provisions of section 10 of the Act. On receipt of this application, the respondent, in compliance with the proviso to section 16(1)(d) of the Act wrote a letter to the applicant on 17th May, 1985 and copied it to the Permanent Secretary, Ministry of Labour. On the same day, the respondent also wrote another letter to COTU and copied it to FKE. By these two letters, the respondent notified the applicant and COTU of the application for registration by the interested party and invited them to submit to him in writing within a period of two weeks from the date of the said letters objections that they wished to make against the registration of the interested party as a Trade Union if they had any such objections.

According to the interested party's proposed constitution and rules, its membership was open to unionisable employees of any Bank, Insurance, Building Society, Savings & Credit Society and Financial Institution carrying on business in Kenya provided that such employees were above the apparent age of 16 years. Like in the case of KUBE, the applicant, COTU and FKE in response to the respondent's letters aforesaid submitted in writing to the respondent their respective objections to the registration of the interested party as a Trade Union which objections like in the case of KUBE were principally that the unionisable employees of the industries sought to be represented by the interested party were adequately and effectively represented by the applicant and that splinter Trade Unions should be discouraged.

Apart from the argument that the interested party represented a wide money market in this country than KUBE and that since the refusal to register KUBE there had been numerous strikes in the Banking industry, about all the other grounds upon which the interested party sought registration as a Trade Union were similar to those of KUBE as are set out above. According to the respondent, after giving a careful consideration to the interested party's application, and after being satisfied that none of the objections referred to above was valid, he in the exercise of the powers conferred upon him by section 11 of the Act accepted the interested party's application for registration and accordingly informed it. In accepting the interested party's application aforementioned, the respondent inter alia took into account the events after his refusal to register KUBE and in particular the numerous strikes, sit-ins and frequent but unfruitful negotiations within the Banking industry which had taken place from the end of 1984 until early 1986. He also took into account the report of the Panel of Investigation dated 26th March, 1986 which had been appointed by the Ministry of Labour to investigate and report on the disputes in the Banking industry in respect of Barclays Bank of Kenya Ltd. and the Standard Chartered Bank Ltd. The respondent also took into consideration the report by Mr. Lief Mills dated 5th July, 1985.

By reason of his consideration of all the matters before him, the respondent came to the conclusion that the applicant was no longer sufficiently or at all representative of the whole or of a substantial proportion of the interests in respect of which registration was being sought by the interested party. Accordingly, on 7th May, 1986 the respondent wrote a letter to the interested party informing it that he had authorised its registration as a Trade Union and in the same letter he enclosed a certificate of registration in this regard dated 7th May, 1986. It is this registration that has aggrieved the applicant. In its amended statement referred to earlier in this ruling, amongst the grounds upon which the applicant sought relief from this court were that:

(a)"The Registrar of Trade Unions was bound to consider the application of Banking, Insurance and Finance Union (K) in the light of his previous decision on a substantially the same matter."

(b)The Registrar of Trade Unions was bound to consider the objections of all parties whose objections he had sought under the provisions of section 16(1) (d) of the Trade Union Act as

well as the objections of the Ministry of Labour, the Central Organisation of Trade Unions, the Federation of Kenya Employers, the provisions of the Government policy, the undertaking given by the Government in the 'Industrial Relations Charter' (Revised 1980) and his own previous decisions on substantially similar matters before proceeding to register the new Union."

At the hearing of the applicant's application before us, the case for the applicant was that the respondent in making his decision to register the interested party as a Trade Union did not correctly understand or give effect to the limits put to him by section 11 and 16 of the Act and that he failed to take into account relevant matters as he was required to do by the aforesaid sections. It was also urged for the applicant that in making the decision aforementioned, the respondent was influenced by extraneous matters which he took into account and which he was not required to by section 11 and 16 of the Act. He also considered certain reports which he did not make available to the applicant and on which the applicant was not given an opportunity to comment on. Finally, it was urged for the applicant that in registering the interested party as a Trade Union, the respondent failed to take into account the declared Government Policy on Trade Unions in Kenya.

The case for the respondent and the interested party was that the respondent in making his decision to register the interested party as a Trade Union acted *intra vires* the provisions of section 11 and 16 of the Act and the Government Policy on Trade Unions in Kenya. Indeed, the respondent was at pains to stress that he earnestly followed the procedure laid down under the Act, considered the various objections that had been lodged under section 16(1) (d) of the Act, and after a careful consideration of the matters before him, he proceeded to register the interested party as a Trade Union. According to him, his decision in this regard was both legal and reasonable and constituted a proper exercise of his discretionary powers under the Act. To the respondent and the interested party, the material before the respondent in respect of the application by the interested party to be registered as a Trade Union constituted sufficient evidence for the respondent to conclude that the applicant was no longer sufficiently or at all representative of the whole or of a substantial proportion of the interests in respect of which registration was being sought by the interested party. Undoubtedly, this conclusion was prejudicial to the applicant and was bound to occasion it some loss in terms of membership and union dues. Yet, according to the respondent and the interested party, apart from submitting in writing any objections that it may have had as is provided for by section 16(1) (d) of the Act, the applicant had no legitimate expectation that it would be given an opportunity to comment on any material that was before the respondent and which material the applicant may have had no knowledge whatsoever that the respondent would take into consideration before making his decision to register or not to register the interested party as a Trade Union. Indeed, to the respondent and the interested party, apart from what is provided for by section 16(1)(d) of the Act, there was no other statutory obligation that entitled the applicant to be heard.

It is not in dispute that matters taken into account by the respondent before he proceeded to register the interested party as a Trade Union and which matters are set out above and were deponed to by the respondent in paragraphs 14, 15 and 16 of his affidavit sworn on 11 November, 1986 were not brought to the attention of the applicant for comment. It will be recalled that when the respondent was considering the application by KUBE as is mentioned above, he sent to KUBE copies of the objections made by the applicant and COTU and invited KUBE to make comments on these objections if it had any before a decision was reached on its application for registration. This was as it should have been.

The right to a fair hearing is a rule of universal application in the case of administrative acts of decisions affecting rights - see the case of **Ridge v. Baldwin**, (1964) A.C. 40. The duty to afford it is a duty lying upon everyone who decides anything and must always include a fair opportunity to those who are parties in the controversy to correct or contract anything prejudicial to their view - see the case of **Board of Education v. Rice and Others**, (1911) A.C. 179. The right to a fair hearing is one of the rules of natural justice which latter as was said by Harman L.J. in the case of **Ridge v. Baldwin**, (1963) 1 Q.B. 539 at page 578 is fair play in action. As is pointed out by H.W.R. Wade in his book on Administrative Law, 5th Edition, at pages 481 and 482:

".....natural justice often requires the disclosure of reports and evidence in the possession

of the deciding authority. The court must always consider the statutory framework within which natural justice is to operate, and a limit may sometimes necessarily be implied. What is essential is substantial fairness to the person adversely affected. But this may sometimes be adequately achieved by telling him the substance of the case he has to meet, without disclosing the precise evidence or the sources of information. The extent of the disclosure required by natural justice may have to be weighed against the prejudice to the scheme of the Act which disclosure may involve."

In the case of *Fairmount Investment Ltd. v. Secretary for the Environment* , (1976) 1 W.L.R. 1255 at page 1263 it was said that:

"-----it is to be implied unless the contrary appears, that Parliament does not authorise----- the exercise of powers in breach of the principles of natural justice-----".

Nyarangi, J.A. in the case of **David Oloo Onyango v. The Attorney -General** Nairobi Court of Appeal, Civil Appeal No. 152 of 1986 (unreported said that:

"There is a presumption in the interpretation of statutes that rules of natural justice will apply."

Although therefore there may have been no statutory obligation for the applicant to be heard save as is provided for by section 15(1) (d) of the Act, the scheme of the said Act does not preclude the application of the rules of natural justice.

Natural justice is concerned with the exercise of power, i.e. with acts or orders which produce legal results and in some way alter someone's legal position to his disadvantage - see page 504 of the 5th Edition of H.W.R. Wade on Administrative Law *supra*. A party to a controversy must therefore be given a fair hearing and the Authority exercising that power must act in good faith and where two sides are involved it must see that matter which come into existence for the purpose of the quasi-lis has started, if that Authority receives a communication from one party or from a third party, it should give the other party and opportunity of commenting on it - see the case of **B. Johnson & Co. (Builders) Ltd. v. Minister of Health** . (1947) 2 All E.R.395 at pages 404 and 405. Indeed, as was said by Reid, L.J. in the case of *Ridge v. Baldwin*, *supra*, at page 80:

"The body with the power to decide cannot lawfully proceed to make a decision until it has afforded to the person affected a proper opportunity to state his case."

Matters taken into account by the respondent as are contained in paragraphs 14, 15 and 16 of his affidavit and which matters are set out above were not brought to the attention of the applicant for comment or otherwise before the decision to register the interested party as a Trade Union was arrived at.

Indeed, there was absolutely no indication that the applicant had any knowledge that the respondent was going to take into account these matters before making the decision to register the interested party. That decision affected the rights of the applicant and it did produce legal results which were to the disadvantage of the applicant. Having therefore not afforded the applicant the opportunity to comment on the matters aforementioned and which matters he took into account as is mentioned above, the respondent acted in breach of one of the principles of natural justice - failure to afford the applicant a fair hearing. As the Act within which he operated in making his decision does not preclude the application of the rules of natural justice, his violation of one of these rules made that decision to be no decision at all for as was pointed out by Wright L.J. in the case of **General Medical Council v. Spackman** , (1943) A.C. 627 at page 644:

"If the principles of natural justice are violated in respect of any decision, it is, indeed, immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. That decision must be declared to be no

decision."

Having reached this conclusion, we are of the view that the applicant's application for an Order of Certiorari must succeed. We therefore grant the said application and direct that the proceedings before the respondent in respect of the application by the interested party for registration as a Trade Union under section 10 of the Act shall be quashed forthwith on their removal into this court. The issue of costs shall be reserved for further argument. Orders accordingly.

**Dated and delivered at Nairobi by Gicheru, J. this 17th day of March, 1988.**

**J.E. GICHERU**

**L.G. MUTHOGA**

**JUDGE**

**COMMISSIONER OF ASSIZE**