REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO 89 OF 1977

TERA ADUDA.....APPELLANT

MUGO NJUGUNA.....APPELLANT

VINCENT MELILE.....APPELLANT

JOSEPH MWENGA.....APPELLANT

PETER CHEGE.....APPELLANT

PAUL OCHIENG .....APPELLANT

PETER ALOO .....APPELLANT

VERSUS

REGISTRAR OF TRADE UNIONS.....RESPONDENT

JUDGMENT

The appellants applied to the Registrar of Trade Unions (hereinafter referred to as "the Registrar") for the registration of a new trade union to be called the "University Workers' Union (Kenya)" pursuant to the provisions of the trade Unions Act (hereinafter referred to as "the Act").

On 22nd June 1977, the Registrar refused registration giving the following grounds for his decision:

> It is hereby notified that the registration of the University Workers Union (Kenya) as a trade union under the Trade Unions Act is refused. The grounds of such refusal are as follows:
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> I am satisfied that another trade union already registered is sufficiently representative of the whole or of a substantial proportion of the interests in respect of which the University Workers Union (Kenya) seeks registration.

The appellants being aggrieved by the refusal, have appealed to this Court under section 18 of the Act. Before I deal with the various grounds of appeal, I consider it pertinent to set out the facts briefly.

On 26th October 1976, the Registrar received an application for registration of the proposed union. On 22nd November 1976, the Registrar notified the applicants, through their advocates, that he was going to conduct an inquiry before he could register the proposed trade union. Such an inquiry is required to be

made under the proviso to section 16(1) of the Act; but for the sake of convenience, I will set out the whole of the relevant part of that subsection:

> The Registrar may, in his discretion, refuse to register any trade union or probationary trade union if he is satisfied that ... (d) Any other trade union already registered is : (i) In the case of a grade of employee orof employees, sufficiently representative of the whole or a substantial proportion of the interests in respect of which the applicants seek registration; or (ii) In the case of an association of trade unions sufficiently representative of the whole or a substantial proportion of the trade union eligible for membership thereof:
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> 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 objection which such trade unions may wish to make against the registration.

The Registrar duly wrote to (1) the General Secretary of the Domestic and Hotel Workers Union, (2) the Secretary-General of the Central Organization of Trade Unions (Kenya) (3) the Permanent Secretary, Ministry of Education, (4) the Registrar of the University of Nairobi, (5) the Registrar of Kenyatta University College, (6) the Permanent Secretary, Ministry of Labour, and (7) the Executive Director of the Federation of Kenya Employers. The reply to the first above-named union was that it represented employees of all educational establishments in the country, that it had already negotiated an agreement with the University of Nairobi which represented the interests of the university employees adequately, and in view of these facts it objected to the registration of the proposed union. The Central Organization of Trade Unions also strongly objected because there was already a registered union representing the area in respect of which the applicants were seeking registration. The Permanent Secretary of the Ministry of Education suggested that the consent of the union already representing the university workers, ie the Domestic and Hotel Workers' Union (hereinafter referred to as "the DHWU") be obtained and that the Kenya National Union of Teachers and the Kenya Federation of Employers be contacted, and that it was not in order for the Ministry of Education to sanction the formation of a new union at that stage. The Registrar of the University of Nairobi wrote that they preferred to continue to deal with the DHWU as hitherto, and considered that membership by university staff of a second union was inadvisable. The fifth reply (from the Kenyatta University College) was not very definitive: all the acting Registrar of the College said was that they would normally deal with a trade union which would operate at the University of Nairobi since that college was a constituent of the university. The sixth reply came from the Permanent Secretary of the Ministry of Labour. That ministry was of the opinion that the DHWU adequately covered the small group of workers at the university who had intended to form a new union. The final reply, from the Executive Director of the Federation of Kenya Employers, was that his federation was opposed to the registration of the proposed union on the ground that the university workers were adequately covered by the collective agreement between the university and the DHWU.

On 18th February 1977, the Registrar forwarded photostat copies of three of the replies (the first, second and seventh) to the advocates for the proposed union and asked for their comments before a decision was reached on the matter. The advocates replied by a lengthy letter dated 8th March 1977; but having considered the application, the Registrar notified the advocates of his refusal to register the proposed trade union by his letter of 22nd June 1977, to which reference has been made earlier.

Mr Ndegwa for the appellants concedes that the Registrar did all that he was required to do under the Act before refusing registration of the proposed trade union, but in effect argues that he erred in law and facts in refusing to do so. The appellants' petition of appeal contains six grounds, and attached to it are three affidavits sworn respectively by the first appellant, Mr Tera Aduda, a gentleman named Mr Nelson Githinji and the fifth appellant, Mr Peter Chege.

I will first deal with the third ground of appeal.

[Sachdeva J then reviewed the evidence and concluded:] Upon consideration of all the evidence before

me on this point, I am unable to find any support for the appellants' contention that the existing union has been shown to be totally (or partly) ineffective in representing its members at the University of Nairobi. Before such a finding can be made, a Court would normally need evidence that all the internal machinery of the existing union has been exhausted but that no concrete results have been obtained.

I will note deal with the first and second grounds of appeal. Mr Ndegwa submits that the DHWU is no longer representative of the staff at the university since all people at the university who were members of the DHWU had resigned from it in July 1976, and that no person in that institution was a member of the DHWU. According to paragraph 4 of Mr Tera Aduda's affidavit, he and 340 other members had resigned from the DHWU. I am not informed what the exact number of members was before the resignation of 341 members in 1976, but according to the letter of DHWU, dated 4th April 1977, that union still had 350 paid-up union members who were in the employment of the University of Nairobi. I have no reason to doubt that figure, and its authenticity has not been challenged by the appellants. Nor has there been any request for particulars.

But be that as it may, I am not prepared to hold that merely by withdrawing from an existing union, members of a proposed union can claim that the existing union is no longer sufficiently representative of its interests. In my view that would be setting a dangerous precedent, and would make an existing union liable to blackmail by any disgruntled section of its members by the simple process of withdrawing from it.

According to Mr Tera Aduda's affidavit, there are about 2800 "unionisable" employees working for the university, and that number did not include over 1000 other people employed as casual labourers. The letter dated 18th March 1978 from Ng'ang'a Kabugi & Co speaks of 4200 such employees. Yet at its alleged inaugural meeting the proposed union was able to attract only 781 persons. Would that number make it any more representative of all the university employees than the DHWU? If one adds up the 350 persons who were still members of the DHWU in April 1977 with the 340 who had resigned in 1976, the total would be near 700 members; not far from the membership the proposed union claims. In any event, in my view, while the membership of a union is not a factor to be ignored, it is not the sole criterion to decide upon the effectiveness of an existing or a proposed union. It is, of course, in the interest of all employees to make their unions strong by supporting them wholeheartedly; but human nature being what it is, short of compulsion, there is no way to safeguard against apathy on the part of the majority of workers in any field of employment.

Regarding the fourth ground of appeal, rule 3(a) of the constitution and rules of the DHWU gives it a wide range of jobs from which it may enrol members, including employees of the "University and University College".

This Mr Ndegwa concedes. However, he contends that since the DHWU was formed, the university has grown and established new faculties and departments whose workers could not be properly represented by the DHWU. He cited, as examples, the workers of the Faculty of Agriculture, the Faculty of Medicine, the Department of Transport and the Department of Maintenance, all of whom have their own peculiar needs. But, with respect to Mr Ndegwa, where is one supposed to draw the line? Of the three affidavits filed in support of this appeal, the first one is from an employee of the Catering Department. I am informed that he works as a cook. The second one is from a night watchman at Kabete Faculty of Veterinary Medicine. The third one is from an animal attendant in the Animal Production Department in the Faculty of Agriculture. Apart from the fact that all these three gentlemen are employees of the university, what else do they have in common? It is apparent from the nature of their respective jobs that their working conditions and working hours must be greatly different. If it is necessary in the interest of all the university workers to have one union at the university representing them, by the same token of logic, what is there to prevent night watchmen, cooks, animal attendants, cleaners, etc all asking for separate unions to represent their peculiar interests? Where would all that splinterism and separatism lead to? Upon becoming an office-bearer or a member of a union, an individual not only acquires certain rights, but also corresponding duties and obligations: the obligation to act with a sense of responsibility towards the country, the duty to keep proper books of account, to file necessary returns and to ensure that dues collected from union members are not misused or squandered. I need not enumerate all these rights

and obligations which are fully contained in the Act, but would small, splinter unions be able to meet all the responsibilities of a union? Is it, in any event, in the interest of the country to have small unions representing their particular type of employees with all the attendant problems of defining the line of division of duties, "closed shops", etc, as many other industrial countries have suffered from?

In my view, in this consideration, it is important to keep in mind Government policy, and the dictates of common sense and reason. In *Dutton v Bognor Regis Urban District Council* [1972] 2 WLR 299, 313, speaking on policy, Lord Denning MR observed:

> This case is entirely novel. Never before has a claim been made against a council or its surveyors for negligence in passing a house. The case itself can be brought within the words of Lord Atkin in *Donoghue v Stevenson* [1932] AC 562 but it is a question whether we should apply them here. In *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 Lord Reid said, at page 1023, that the words of Lord Atkin expressed a principle which ought to apply in general 'unless there is some justification or valid explanation for its exclusion'. So did Lord Perrson at page 1054. But Lord Diplock spoke differently. He said that it was a guide but not a principle of universal application (page 1060). It seems to me that it is a question of policy which we, as judges, have to decide. The time has come when, in cases of new import, we should decide them according to the reason of the thing.

I consider the last two sentences important, and I respectfully adopt that view. In 1965, the Kenya Government published a report on *The Policy on Trade Union Organisation in Kenya*, which was accepted by HE the President with, *inter alia*, the following remarks:

> I must make it quite clear that the committee's report is not being issued for the purpose of debate and further argument. There has been enough quarrelling in the past. Those concerned have had their opportunity to make their views known. The publication of this document indicates the full acceptance of the recommendations in the report and a determination to put them into effect. I trust that in the implementation of this fundamental State policy my Government will have complete cooperation and support from all parties.

The members of the committee, which prepared the report, were Messrs JG Kiano, LG Sagini, R Achieng Oneko, J Murumbi, J Nyamweya, JS Gichuru, CM Njonjo and TJ Mboya. Clause 8 of the report under the heading "Amalgamation" reads:

> That the Central Organisation of Trade Unions (Kenya) shall maintain, as one of its urgent and primary objectives, the amalgamation of trade unions in order to have fewer but stronger and viable trade unions. The Ministry of Labour will be consulted as to the classification of trade unions, etc, and will afford every assistance to the Central Organisation in establishing its administrative structure.

Mr Ndegwa argues that the above recommendation does not deal with the formation of new unions; nor restricts them; but deals only with the amalgamation of smaller groups. With respect, that argument begs the question. The recommendation is clearly meant to avoid the creation of small, weak and bickering trade unions which are not viable.

The fifth ground of appeal, that the Registrar's refusal is tantamount to denying the appellants their constitutional freedom of association, was not pressed. It is, in any event, amply covered by section 80(2)(d) of the Kenya Constitution.

The sixth and the final ground of appeal is an omnibus ground that the Registrar's decision is against the weight of the evidence supplied to him.

I have already dealt with it in detail. With respect it is not. On the contrary, the Registrar appears to have taken all relevant factors and considerations into account before making his decision refusing to register the proposed union.

I understand that there have been only three earlier such appeals. The first was *Odiaga v Registrar of Societies* (unreported). In that appeal Sir Ronald Sinclair CJ observed, *inter alia*:

> Furthermore, it is, to my mind, clear that the appellants seek registration of the new union, not because the interests of any class or category of workers are insufficiently represented by the Railway African Union, but because they are dissatisfied with the management of the Railway African Union. I would point out that it is open to dissatisfied members of the Union to seek the election and appointment of newofficers.

Not only have I expressed similar views above, but I would go further and add that a proposed splinter union should normally exhaust all the internal machinery of the existing union before expecting sympathy in its drive for registration.

The second is *Angaha v Registrar of Trade Unions* [1973] EA 297, 304, where Muli J upheld the Registrar's refusal to register a proposed union and stated:

> The Registrar is charged with the duty to satisfy himself that the policy laid down under the Constitution and safeguarded by the provisions under the Trade Unions Act is not infringed. Being a right in the nature of contingent right upon fulfilment of certain requirements under the Act the Registrar was bound to observe the policy and to ensure that the requirements of the relevant provisions were complied with.
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> He had ample evidence that the interests of the proposed trade union were sufficiently represented or a substantial portion thereof were represented by the other registered trade unions. His refusal to register the proposed trade union was not to divest itself of a vested right and therefore he had no duty to call upon them to show cause why the proposed union should not be refused registration.
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> The exercise of his discretion was fully justified in the interest of the policy entrenched in the Constitution.
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> It would have meant breach of the constitutional duty and policy if he allowed registration of the proposed trade union while seized with evidence that the proposed trade union was not qualified. It would have encouraged members to quit the registered union and the formation of another trade union with almost identical objectives to those of existing trade unions.
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> The Registrar was not bound to be satisfied on preponderance of evidence or even on balance of probabilities. Any scintilla of evidence that the interests of the appellants were sufficiently or substantially represented by the other trade unions was sufficient. In this case the Registrar had ample evidence before him to arrive at the decision he did.

The third appeal, and upon which Mr Ndegwa relied heavily, was *Alukwe v Registrar of Trade Unions* (unreported) in which Simpson J ruled as follows upon the Registrar's refusal to register a new union to be called "The Kenya Bakers and Confectionary Workers Union":

> > There is no indication that he (ie the Registrar) considered whether a union composed largely of domestic and hotel workers union could sufficiently represent the interests (or a substantial portion of the interests) of bakers and confectioners employed in industry.

There is no indication that he 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 union.

With respect to Mr Ndegwa, the above decision is clearly distinguishable from the present appeal in that the Registrar had chosen to give his reasons for refusing to register the new union in some detail, and all that the judge did was to point out flaws or shortcomings in the Registrar's reasoning, and invite him to

reconsider his decision on the lines suggested by the judge, at the same time acknowledging that this was a field in which the Registrar had special knowledge and experience. Of course, that must not be understood to mean that the Courts have abdicated their powers in favour of the Registrar: Courts will interfere and grant appropriate redress as the particular circumstances of any case may warrant. However, in my view it is not necessary for the Registrar to give detailed reasons for refusing to register a proposed union. It is clear from reading the whole of section 16 of the Act that all that the Registrar is required to do is to be satisfied that one or more of the requirements under the section are not complied with and, if so satisfied, he may refuse registration in his discretion. There is no suggestion that the Registrar acted *ultra vires* the Act or that he acted in bad faith. Once the Registrar has made his decision, keeping in consideration all the matters which he is required to do, the onus is on the appellants to satisfy the Court that his decision was erroneous in view of all the available evidence. In this connection I am in full agreement with the decision of Muli J in *Angaha's* case.

To sum up, I have no doubt that the Registrar used his discretion properly in refusing to register the proposed union on the ground that another union already registered is sufficiently representative of the whole or of a substantial proportion of the interests in respect of which the proposed union was seeking registration, and further that, upon all the evidence and material available before him, he could have come to no different conclusion. Accordingly, this appeal is dismissed.

Appeal dismissed with costs.

Dated and delivered at Nairobi this 16th day of June 1978

S.K SACHDEVA

JUDGE