Ongera & 2 others v Registrar of Trade Unions & another (Civil Appeal 469 of 2018) [2024] KECA 108 (KLR) (9 February 2024) (Judgment)

Neutral citation: [2024] KECA 108 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 469 OF 2018

SG KAIRU, F TUIYOTT & JW LESSIT, JJA

FEBRUARY 9, 2024

BETWEEN

JOEL MBUTHIA ..... 1ST APPELLANT

SAMSON O. ONGERA ..... 2ND APPELLANT

STEVE O. HANGALA ..... 3RD APPELLANT

AND

REGISTRAR OF TRADE UNIONS ..... 1ST RESPONDENT

UNION OF COMMERCIAL FOOD AND ALLIED WORKERS .... 2ND RESPONDENT

(An appeal from the judgment of the Employment and Labour Relations Court of Kenya at Nairobi (Wasilwa, J.) delivered on 3rd October 2018 in ELRC Appeal No. 3 of 2017)

JUDGMENT

1. In this appeal, the appellants, Joel Mbuthia, Samson O. Ongera and Steve O. Hangala, as promoters of a proposed trade union, National Union of Shops-Retailers and General Merchants Workers (the proposed trade union), are challenging a judgment delivered on 3rd October 2018 in which the Employment and Labour Relations Court (ELRC) at Nairobi (H. Wasilwa, J.) dismissed their appeal against a decision made on 20th April 2016 by the 1st respondent, Registrar of Trade Unions (the Registrar), refusing to register the proposed trade union on grounds that the workers in the sector "can join the existing union" namely, the 2nd respondent, Kenya Union of Commercial Food and Allied Workers.

2. The underlying facts are not in dispute. The appellants applied to the Registrar by a letter dated May 27, 2015 for a Certificate of Recruitment of the proposed union. The Registrar issued the same to the appellants on June 2, 2015. On July 7, 2015, the appellants applied to the Registrar for registration

of the proposed union. The Registrar published the application for registration in the Kenya Gazette of August 21, 2015. On September 8, 2015, the 2nd respondent objected to the registration by letter which the Registrar transmitted to the appellants for comments. The appellants responded by letter dated September 24, 2015 justifying registration of the proposed union.

3. The Registrar consulted the National Labour Board in accordance with section 19 of the *Labour Relations Act*, 2007 which, upon deliberating on the same, expressed that there existed another registered trade union, namely the 2nd respondent, which represents the sector targeted by the appellants and recommended to the Registrar to decline registration of the proposed union.

4. By a letter dated April 20, 2016, the Registrar informed the appellants that "the National Labour Board at its meeting held on 7th and 8th April 2016 did not approve the registration of the proposed union" and enclosed a notification of refusal of registration, Form D, in which the Registrar notified the appellants that the registration of the proposed union "is refused" on the grounds that "the Board noted that workers in the sector can join the existing union" of the 2nd respondent "which adequately represents the sector targeted by your proposed union."

5. The appellants challenged that decision before the ELRC in Appeal No. 3 of 2017 and sought orders that the decision of the Registrar contained in the said Form D is illegal, unlawful, frivolous, ultra vires and the same be quashed; a declaration that the Registrar breached appellants fundamental rights and freedom of association; an order to compel the Registrar to register the proposed union; and an order directed to the 2nd respondent to delete the word "allied" from its name and "to amend its constitution to remove any/all objectives that are now functions of the other trade unions."

6. In dismissing the appeal, the learned Judge of the ELRC in the impugned judgment delivered on October 3, 2018 cited the decision of this Court in *Charles Salano & 9 others v Registrar of Trade Unions and Kenya Union of Commercial Food and Allied Workers* CA No. 19 of 2016 (Charles Salano case) and disposed of the appeal on the ground that there are other trade unions that are able to cater for members in the retail sector targeted by the appellants.

7. The appellants have challenged that decision on eight grounds of appeal set out in the memorandum of appeal. We heard the appeal on October 31, 2023 when the second appellant, Samson O. Ongera, appearing in person on his own behalf indicated that the 1st and 3rd appellants, though served had not appeared. The second appellant relied on his written submissions dated June 6, 2019. Learned counsel Mr. A. Nyabena appeared for the 2nd respondent and relied on his written submissions dated December 9, 2019. There was no appearance for the Registrar despite service of notice of hearing. The Attorney General had however filed written submissions dated 9th March 2019 on behalf of the Registrar.

8. The first plank of the appellants' appeal is that the Judge erred in upholding the decision of the Registrar that the sector targeted by the proposed union was adequately or sufficiently represented by the 2nd respondent. It was urged that the appellants presented evidence which was not rebutted to demonstrate that retail supermarkets, shopping stores, wholesalers, malls and other retail outlets that were not catered for by existing trade unions; and that the recognition agreements and collective bargaining agreements produced by the 2nd respondent covered only a few, seven, supermarkets.

9. It was submitted that it was incumbent upon the Registrar to tender empirical evidence to demonstrate that the industries targeted by the appellants were represented by the 2nd respondent and without such evidence, the learned Judge erred in upholding the decision of the Registrar. The appellant cited the decision of the ELRC in the case of *Nahason Ndiamae & 9 others v Registrar of Trade Unions* [2017] eKLR in support of the argument that the Registrar was obligated to "demonstrate compelling reasons

supported by tangible evidence" that unions that object to registration of a rival union "sufficiently represent the whole or a substantial proportion of the interests of the sector in question."

10. It was urged that a provision in a union's constitution containing an objective to represent a certain industry or sector is not tantamount to sufficient representation for purposes of section 14 of the *Labour Relations Act* and the Judge erred in taking the converse position. It was submitted that the judge fell into error in failing to properly evaluate and consider the evidence which was made available before reaching her decision.

11. The second plank of the appeal is that in reaching her decision, the Judge foraged beyond the pleadings and the evidence; that the Judge referred to written submissions filed by the Registrar when no such submissions had been filed; that there was no mention in the pleadings that the sector targeted by the proposed union was "adequately represented by two registered trade unions". The case of *Independent Electoral and Boundaries Commission and another v Stephen Mutinda Mule and 3 others* [2014] eKLR was amongst the cases cited by the appellants for the proposition that parties and the court are bound by pleadings. It was urged that the judge went out of her way and travelled outside the pleadings and evidence to assist the respondents.

12. The appellant further submitted that despite having correctly stated that the appellants proposed union should not be barred from registration because of another existing union, the Judge erred in relying on this Court's decision in *Charles Salano* case, which according to the appellant is distinguishable. It was submitted that in that case the promoters of the proposed trade unions were merely splinter groups from already existing trade union as opposed to the present case where the targeted employees did not belong to any trade union.

13. In written submissions dated March 9, 2019 filed by Ernest Kioko, Litigation counsel for the Attorney General on behalf of the the Registrar, it is submitted that under the *Labour Relations Act*, the respondent is empowered to decline an application to register a proposed trade union on the ground that there is already an existing registered trade union which sufficiently represents the whole or substantial proportion of interests in respect of which the applicants seek registration; and that in the present case the Registrar was of the view that the interest sought to be represented by the appellants was sufficiently represented by the 2nd respondent; that under the *constitution* of the 2nd respondent it was clear that the 2nd respondent was entitled to represent employees engaged or employed in supermarkets, shops retail and wholesale outlets in the area where the appellants wished to venture into. It was submitted that the ELRC rightly applied the decision of this Court in *Charles Salano case*, and the appellants constitutional right to freedom of association and right to fair labour practice was not violated having regard to article 24 of the *Constitution*.

14. Citing the Supreme Court of Kenya decision in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate & 4 others* [2013] eKLR, it was submitted that there is no basis for this Court to depart from the decision in *Charles Salano case*. With that, this Court was asked to uphold the decision of the ELRC.

15. For the 2nd respondent, Mr. Nyabena in his written submissions argued that it was demonstrated that there is already a union representing a substantial number of members for whom the appellants wish to form a union to represent and the decision of the Registrar and of the ELRC is merited and well-grounded in law; that it is not in dispute that the 2nd respondent is a registered union with the legal mandate to sufficiently represent employees in the sector intended to be served by the proposed union and sample documents were presented to the court in support. Counsel urged the court to emulate the case of *Frank Esevwe & 6 others (being proposers and promoters of Universities Service Workers Union) v Registrar of Trade Unions* [2018] eKLR where the court declined registration of a proposed union where the area proposed to be covered was already served by an existing union.

16. Regarding the contention by the appellants that the ELRC looked beyond the pleadings and the evidence, it was submitted that this claim is not supported by the record; that the specific points and facts allegedly relied upon by the ELRC which were not pleaded are not indicated.

17. As regard the *Charles Salano case*, it was submitted that there is no basis for departing from it; that an individual's right to freedom of association like all other rights under the *Constitution* are subject to limitation in accordance with article 24 of the *Constitution*; that the *Labour Relations Act*, 2007 has provisions which limit the right to freedom of association; that Section 12 of that Act stipulates the requisite conditions precedent which must be met before a trade union is registered and confers on the Registrar the discretion to register or decline registration of a trade union, if there is another union representing the category of employees that the applicant seeks to represent.

18. We have considered the appeal and the submissions. The eight grounds of appeal in the memorandum of appeal coalesce into three main issues. The first is whether the Judge erred in upholding the decision of the Registrar that the sector targeted by the proposed union was adequately or sufficiently catered for. The second issue is whether the Judge went beyond the pleadings and the evidence. The third issue is whether the Judge erred in relying on this court's decision in *Charles Salano case*.

19. We start with the question whether the Judge erred in upholding the decision of the Registrar that the sector targeted by the appellants' proposed union was adequately or sufficiently catered for. The process for establishment and registration of trade unions is provided for under Part III of the *Labour Relations Act*, Act No. 14 of 2007 (the Act). Under section 12 thereof, recruitment of members for purposes of establishing a trade union must be preceded by obtaining a certificate from the Registrar. It is common ground that that was done in this case.

20. Section 14 of the *Act* spells out the requirements for registering a trade union which include submission of an application to the Registrar; adoption of a constitution that complies with the requirements under the First Schedule to the *Act*; existence of an office and postal address within Kenya, and of significance to this appeal, under section 14(1)(d)(i) of the *Act*, it is imperative that:

> " No other trade union already registered is-
>
> i. in the case of a trade union of employers or of employees, sufficiently representative of the whole or of a substantial proportion of the interests in respect of which ...".

21. Section 14(2) goes on to provide that notwithstanding the provisions of section 14(1)(d):

> " ...the Registrar may register a trade union consisting of persons working in more than one sector, if the Registrar is satisfied that the constitution contains suitable provisions to protect and promote the respective sectoral interests of the employees."

22. Under section 20 of the *Act*, if the Registrar is not satisfied that a trade union meets the requirements for registration and refuses the application for registration, the Registrar is required to advise the trade union of the reasons for that refusal in Form D set out in the second schedule as was done in this case.

23. In effect, the registrar is conferred with discretion, within the parameters of the *Act*, to accept or refuse to register a proposed trade union. It is a discretion comparable to judicial discretion which "is not a wild and unaccountable discretion" but a discretion to be exercised on settled principles. See *Peter Muthoka and another v Ochieng & 3 others* [2019] eKLR.

24. For the ELRC to have interfered with the decision of the Registrar, it was incumbent upon the appellants to satisfy that court, that the Registrar misdirected herself in refusing to register the proposed union, that she failed to consider relevant matters or considered irrelevant matters, or that her decision is plainly wrong. See also *United India Insurance Co Ltd Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co Ltd v East African Underwriters (Kenya) Ltd* (1985) eKLR.

25. In this case the reason given by the Registrar in Form D sent to the appellants was that the 2nd respondent:

> "...represents employees engaged in warehouses, merchandises, supermarkets, shops, retail and wholesale outlets, distribution and supply companies, among others.
>
> It was noted that this is the same sector you are seeking to represent hence registration would lead to a duplication in the representation."

26. The appellants argued that Registrar should have tendered empirical evidence to demonstrate that the industries targeted by the appellants were represented by the 2nd respondent.

27. Apart from the consideration that constitution of the 2nd respondent expressly provided, under rule 3, that membership of the union shall be open to all employees engaged in shops, shopping malls, trade pavilions, trade exhibitions, retailers, retail chains, retail outlets, general merchants, hardware shops, small manufacturers, distributors, general shops, and general workers, the second respondent produced sample collective bargaining agreements as well as recognition agreements entered into between itself and various supermarket.

28. There was an evidentiary basis, therefore, on which the Registrar reached the decision that she did under Section 14(1)(d)(i) of the *Act*, that there was sufficient representation of a substantial proportion of the interests in respect of which the appellants sought registration.

29. We are therefore fully in agreement with the learned Judge when she expressed in her judgment:

> "I find that there are other trade unions who are able to cater for members who are in the retail industry as seen above and in order not to proliferate the trade unions in existence and weaken them, it is my finding that the 1st respondent [the Registrar] was properly guided in rejecting the registration of the appellants herein."

30. We turn to the appellants' complaint that the Judge erred in applying the decision of this Court in the *Charles Salano case*. The circumstances in that case were that the appellants therein were desirous of registering a trade union and applied to the Registrar for a certificate of establishment of a trade union under section 12(1) of the *Act*. Citing Section 14(1)(d) of the *Act*, the registrar declined to grant it on grounds that there was already a union in existence covering the membership in the sector targeted by the appellants therein. A challenge of the decision of the Registrar before the Industrial Court was unsuccessful whereupon an appeal to this Court was lodged.

31. It was contended in that appeal (as it is contended in the present appeal) that the decision of the ELRC misapplied the provisions of Article 24 of the *Constitution* by limiting the appellant's rights of association under Article 41 of the *Constitution*. To that end, this Court in the *Charles Salano case* pronounced as follows:

> "In our view, we find and hold the limitation of the appellant right under article 36 and 41 of the *Constitution* to be reasonable and justifiable in an open and democratic society. This is because the appellant interests are already sufficiently re- presented by an existing

trade union and creation of arrival trade union would create confusion in the area that the appellant intended to represent."

32. That case is distinguishable from the present case only to the extent that the application by the promoters in that case was for a certificate of establishment of a trade union, while in the present case, that step had been passed and the appellants had progressed to the next stage of seeking registration of the proposed union. The principle established in that case is sound and applicable. Undoubtedly, under article 24 of the *Constitution*, a right or fundamental right can be limited to the extent "that the limitation is reasonable and justifiable in an open and democratic society".

33. The restriction to freedom of association in this case is provided for in the Act. It serves a legitimate purpose, which as stated by the Judge, is to avoid a proliferation and weakening of trade unions and is necessary and proportional. See decisions of the African Court on Human and Peoples' Rights of the African Union in the context of the freedom of expression in the case of *In the Matter of Loh'e Issa Konate vs. Burkina Faso*; Application No. 004/2013 as well as the case of *In the Matter of Ingabire Victorie Umuhoza vs. Republic of Rwanda*; Application 003/2014. There is no merit in this complaint.

34. There is then the issue of the judge having based her decision on new facts and materials. In that regard it was urged that the Judge referred to written submissions by the 1st respondent when none were filed and that the judge referred to "two unions" when there was no reference to the same in the pleadings or in the evidence. In paragraphs 21 to 33 of the judgment, the Judge summarized "the appellants' written submission." In paragraph 34 to 38, "the respondent's submissions" were summarized. And in paragraphs 39 to 41 of the judgment, the "interested party's submissions" are captured. It the statement in paragraph 34 of the judgment where the Judge summarized the respondent's submissions that is the source of the appellant's grievance. In that paragraph, the Judge stated:

> " It is submitted that the area of interest by the proposed union is adequately represented by two registered trade unions and its registration would be contrary to section 14(1)(d) of the *Labour Relations Act*."

35. Although the respondent's submissions before the ELRC are not part of the record of appeal before us, we doubt that the learned Judge of the ELRC would have created or imagined and summarized 'nonexistent submissions'. Is it possible that the respondent (the Registrar) filed submissions before the ELRC and did not serve them on the appellants? We can only speculate.

36. What is critical in our view, is that the decision of the Registrar which the learned Judge upheld was based on the specific finding that the 2nd respondent represents employees engaged in the same sector the appellants were seeking to represent which "would lead to a duplication in the representation."

37. Based on the foregoing, we find no merit in this appeal. It is accordingly dismissed with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF FEBRUARY 2024.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR